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**CLIMATE CHANGE AND INTERNATIONAL SECURITY:
REVEALING NEW CHALLENGES TO THE CONTINUATION OF PACIFIC ISLANDS'
STATEHOOD**

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TABLE OF CONTENTS

| | |
|-------------------------------|-------|
| <u>SUMMARY/ RESUMEN</u> | 11-20 |
|-------------------------------|-------|

INTRODUCTION

| | |
|--|-------|
| 1. Climate Change, International Security and the State at a Crossroads..... | 21-30 |
| 2. Normative Discoveries and Methodological Choices..... | 30-33 |
| 3. Structure of the Thesis..... | 33-36 |

PART I

THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE: A RECONSTRUCTION

CHAPTER 1

THE RISE AND FALL OF THE 'INTERNATIONAL ENVIRONMENTAL SECURITY' CONCEPT: A PRECEDENT TO THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE (1985-2005)

| | |
|--|--------------|
| 1. INTRODUCTION | 38-41 |
| 2. THE BIRTH OF 'INTERNATIONAL ECOLOGICAL SECURITY': A PRODUCT OF SOVIET 'NEW THINKING' (PERESTROIKA)..... | 41-52 |
| 2.1. Perestroika and International Law in Context | |
| 2.1.1. <i>Soviet 'Traditional' Thinking and International Law: From the 1917 Russian Revolution to Détente</i> | |
| 2.1.2. <i>Soviet 'New Thinking' and International Law: The Change of Paradigm</i> | |
| 2.2. The 'Green Dimensions' of Perestroika | |
| 2.2.1. <i>'Ecological Security': Launch of the New Soviet Environmental Protection Strategy</i> | |
| 2.2.2. <i>'International Ecological Security': Combined Product of National Environmentalism and the Reification of International Law</i> | |
| 3. 'INTERNATIONAL ENVIRONMENTAL SECURITY' IN THE LATE PHASE OF THE COLD WAR: INCLUSION IN THE AGENDA OF THE UNITED NATIONS (1985-1991) | 52-62 |
| 3.1. The Positive Dimension: 'International Environmental Security' as International Environmental Co-operation (Phase One: 1985-1987) | |
| 3.1.1. <i>A Controversial Framework: Gorbachev's Project for a 'Comprehensive System of International Peace and Security'</i> | |
| 3.1.2. <i>An Innovative Component: The Draft Proposal on 'International Ecological Security' at the Second Committee of the General Assembly on Economic and Financial Matters</i> | |
| 3.2. The Negative Dimension: 'International Environmental Security' as International Disarmament Co-operation (Phase Two: 1988-1991) | |
| 3.2.1. <i>Shifting Locations: Rise of the Soviet 'Comprehensive Approach to International Peace and Security' at the First Committee of the General Assembly on Security and Disarmament</i> | |
| 3.2.2. <i>Limited Timing: Break-up of the USSR and the Legacy of the 'Comprehensive Approach to International Peace and Security' Project</i> | |
| 4. ENVIRONMENTAL APPROACHES TO SECURITY AT THE INCEPTION OF THE NEW WORLD ORDER: FURTHER DEVELOPMENTS OUTSIDE THE UNITED NATIONS SYSTEM (1991-2005) | 62-79 |
| 4.1. Changing Theoretical Conceptualizations: Environmental Component of Security in International Security Studies | |
| 4.1.1. <i>Constructivism and the Copenhagen School: The 'Securitization' of the Environment'</i> | |
| 4.1.2. <i>Critical Thinking of Security: Redefining Sovereignty in the Ecological Era</i> | |
| 4.2. Innovative Empirical Research: The Quest for the Environmental Causes of Conflict | |
| 4.2.1. <i>Spread of Empirical Studies: A Euro-Atlantic Movement</i> | |
| 4.2.2. <i>Opposing Voices: Ontological and Epistemological Critiques</i> | |
| 5. CONCLUSIONS..... | 79-82 |

CHAPTER 2

MAPPING THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE: CONSTRUCTION AND CIRCULATION IN REGIONAL ORGANIZATIONS

| | |
|--|----------------|
| 1. INTRODUCTION..... | 84-88 |
| 2. CONSTRUCTION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE IN HEGEMONIC REGIONS: A PRODUCT OF GEO-POLITICAL CONCERNS..... | 88-112 |
| 2.1. Launch of the Discourse: its Institutionalization in the European Union (EU) | |
| 2.1.1. <i>German Origins: Early Formulations of the Climate Change and International Security Discourse at a National Level</i> | |
| 2.1.2. <i>European Cradle: Mainstreaming the Climate Change and International Security Discourse across the EU and EU Member States' Policies</i> | |
| 2.2. Consolidation of the Discourse: its Extension to the Organization of Security and Co-operation in Europe (OSCE) and the North Atlantic Treaty Organization (NATO) | |
| 2.2.1. <i>Informal Transatlantic Extension: Exchanging Information with the Parallel U.S. Approaches to Climate Change and International Security</i> | |
| 2.2.2. <i>Formal Transatlantic Extension: Intertwined Introduction of the Climate Change and International Security Discourse into the Agendas of Two Regional Security Organizations (OSCE and NATO)</i> | |
| 3. CIRCULATION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO THE MOST VULNERABLE REGIONS: IN SEARCH OF A LEGITIMIZING PARTNER..... | 112-130 |
| 3.1. Introduction of the Discourse into the Agenda of the Pacific Islands Forum: Securitization of the Predominant Developmental Approach to Climate Change | |
| 3.1.1. <i>Shifting Oceans: Indian vs. Pacific Island States as Loci of Reception of the Climate Change and International Security Discourse</i> | |
| 3.1.2. <i>Forging Ties: Reinvigorated Political Partnership and Innovative Financial Assistance for Climate Change Adaptation as Vehicles of Implementation of the Climate Change and International Security Discourse</i> | |
| 3.2. Introduction of the Discourse into the Agenda of the African Union: Diversification of the Sectors of Inter-Regional Co-operation | |
| 3.2.1. <i>Reminiscing 'Green Ghosts': African Scenarios of Environmental Stress and Conflict as Natural Loci of Reception of the Climate Change and International Security Discourse</i> | |
| 3.2.2. <i>Developing Ties: Innovative Inter-Regional Co-operative Framework for Renewable Energy as a Vehicle of the Climate Change and International Security Discourse</i> | |
| 4. RESTRAINED ACCESS OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO EMERGING REGIONS: BETWEEN DISINTEREST AND RELUCTANCE..... | 130-139 |
| 4.1. Treatment of the Climate Change and International Security Discourse in Asia: A Distant Look | |
| 4.1.1. <i>Small Benches: Lack of an Appropriate Forum for Reception of the Climate Change and International Security Discourse</i> | |
| 4.1.2. <i>Unfruitful Attempts: The Disinterest in Incorporating the Climate Change and International Security Discourse into the Agendas of the Association of South East Asian Nations (ASEAN) and the Shanghai Co-operation Organization (SCO)</i> | |
| 4.2. Treatment of the Climate Change and International Security Discourse in Latin America and the Caribbean: A Reluctant Approach | |
| 4.2.1. <i>Reluctance in Inter-American North–South Co-operation: Heterogeneity of the Receptor Fora (OAS, CARICOM)</i> | |
| 4.2.2. <i>Reluctance in Latin American South–South Co-operation: Competing Economic Interests and Ideological Divides (MERCOSUR, UNASUR, ALBA)</i> | |
| 5. CONCLUSIONS..... | 139-141 |

CHAPTER 3

THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE IN OPERATION: INTRODUCTION AND RESIGNIFICATION IN UNIVERSAL ORGANIZATIONS

| | |
|--|----------------|
| 1. INTRODUCTION..... | 143-145 |
| 2. THE UN SECURITY COUNCIL DEBATE ON ‘SECURITY, ENERGY AND CLIMATE’ (2007): THE FIRST ATTEMPT TO SECURITIZE CLIMATE CHANGE..... | 145-166 |
| 2.1. ‘Greening’ the Security Council? Origins of the Debate in Perspective | |
| <i>2.1.1. Involvement of the UNSC with Environmental Issues since the End of the Cold War: From Ecological Crimes to Sustainable Development</i> | |
| <i>2.1.2. The 2007 British Proposal: Introducing the German-driven EU Climate Change and International Security Discourse to Universal Organizations</i> | |
| 2.2. The Dividing Lines between ‘Survivalism’ and ‘Developmentalism’ as Two Irreconcilable Positions | |
| <i>2.2.1. Proponents of the Debate: Hegemonic and Existential ‘Survivalists’</i> | |
| <i>2.2.2. Opponents of the Debate: Emerging States and Their ‘Developmentalist’ Allies</i> | |
| 3. THE UN GENERAL ASSEMBLY RESOLUTION ON ‘CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS’ (2009): A LEGITIMIZING AND EXPANSIVE MOVE..... | 166-177 |
| 3.1. The Road to UNGA Resolution 63/281 (2009): Resignifying the Climate Change and International Security Discourse | |
| <i>3.1.1. The 2008 Proposal of Pacific Island States: A Shift in the Commanding Hands</i> | |
| <i>3.1.2. The Adoption of the Resolution by the General Assembly: Reaching a Compromise on the Dividing Lines of the Debate</i> | |
| 3.2. From UN Organs to UN Agencies and Institutions: Spreading the Climate Change and International Security Discourse | |
| <i>3.2.1. The Impact of the Copenhagen Climate Change Summit on the Climate Change and International Security Discourse</i> | |
| <i>3.2.2. Intra-institutional Circulation of the Security Approach to Climate Change in UN Agencies and Institutions</i> | |
| 4. THE SECOND SECURITY COUNCIL DEBATE ON ‘MAINTAINING INTERNATIONAL PEACE AND SECURITY, CLIMATE CHANGE IMPACTS’ (2011): TOWARDS A CONSOLIDATION OF THE SECURITY APPROACH TO CLIMATE CHANGE IN THE UNITED NATIONS..... | 177-197 |
| 4.1. Back to the Security Council: The Pursuit of the German Strategy | |
| <i>4.1.1. Increased Awareness of Climate Change Impacts in Mainstream Climate Change Negotiations: From Copenhagen to the Durban Climate Change Summit (2009–2011)</i> | |
| <i>4.1.2. The 2011 German Proposal: A Historical Opportunity</i> | |
| 4.2. Climate Change and International Security: A Discourse in Progress | |
| <i>4.2.1. Dilution of the Proponents/Opponents Divide</i> | |
| <i>4.2.2. Consolidation of a New Understanding and Adoption of the 2011 Security Council Presidential Statement: Starting Point of a New Security Council Practice?</i> | |
| 5. CONCLUSIONS..... | 197-199 |

PART II
LEGAL IMPLICATIONS OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE:

CHALLENGES TO THE CONTINUATION OF PACIFIC ISLANDS' STATEHOOD

CHAPTER 4

**ADVERSE IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLANDS' STATEHOOD:
THE CHALLENGE OF DE-TERRITORIALIZATION**

| | |
|--|----------------|
| 1. INTRODUCTION..... | 202-208 |
| 2. THE TERRITORIALIZATION OF NATIONHOOD: FUNDAMENTAL FACTOR IN THE CREATION OF STATES..... | 208-238 |
| 2.1. The Meaning of Territory at the Inception of the Modern European State | |
| 2.1.1. <i>From the Feudal Territorialization of Allegiance to the Westphalian Principle of Territorial Sovereignty</i> | |
| 2.1.2. <i>The Myriad of Pre-Charter Theories on the Legal Nature of Territory</i> | |
| 2.2. The Meaning of Territory in the Creation of Post-Colonial Pacific Island States | |
| 2.2.1. <i>Decolonization and the Creation of Pacific Island States: Limited Territoriality Justified by a New Normative Framework</i> | |
| 2.2.2. <i>Micro-States in the United Nations: Limited Territoriality Superseded by Active Participation in the International Community</i> | |
| 3. SCENARIO 1. PARTIAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: JEOPARDIZING THE MARITIME SPACES OF THE STATE..... | 238-275 |
| 3.1. Effects of Coastal Geographical Changes on Maritime Rights | |
| 3.1.1. <i>Coastal Geographical Transformation and Undelimited Maritime Boundaries</i> | |
| 3.1.2. <i>Coastal Geographical Transformation and Maritime Delimitation Agreements</i> | |
| 3.2. Preventive and Responsive Measures against the Loss of Maritime Spaces | |
| 3.2.1. <i>Physical Devices: Mainstreaming Coastal Protection Strategies in National Climate Change Adaptation Plans</i> | |
| 3.2.2. <i>Legal Devices: Protecting Maritime Boundaries by Ratifying Maritime Delimitation Agreements, Fixing Baselines and Effecting Archipelagic Status</i> | |
| 4. SCENARIO 2. TOTAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: UNCERTAIN EFFECTS ON THE CONTINUATION OF THE STATE..... | 276-285 |
| 4.1. Fighting for the Continuation of the State through 'Re-territorialization' Strategies | |
| 4.1.1. <i>Land Acquisition by Cession or Purchase from another State</i> | |
| 4.1.2. <i>Merger with Another State</i> | |
| 4.2. De-territorialized Pacific Island States: A New Form of <i>Sui Generis</i> 'Non-State Sovereign Entity'? | |
| 4.2.1. <i>Two Precedents of Existing Recognized Non-State Sovereign Entities: The Holy See and the Order of Malta</i> | |
| 4.2.2. <i>Protecting the Pacific Island Nations through the Continuation of the State: Back to the Functionalist Approach to the Role of Territory in the Configuration of Statehood</i> | |
| 5. CONCLUSIONS..... | 285-288 |

CHAPTER 5

ADVERSE IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLANDERS: THE CHALLENGE OF 'DE-POPULATION'

| | |
|--|----------------|
| 1. INTRODUCTION..... | 290-293 |
| 2. COMPARING FACTUAL GROUNDS: POLICY APPROACHES TO NATIONAL AND TRANSNATIONAL CLIMATE-INDUCED RELOCATION IN PACIFIC ISLAND STATES..... | 294-317 |
| 2.1. Regional Homogeneity of Preventive Relocation Actions | |
| <i>2.1.1. Common Vulnerabilities: Underdevelopment Overexposed to Climate Change Impacts</i> | |
| <i>2.1.2. Common Responses: Regional Co-operation Schemes for Climate Change Adaptation</i> | |
| 2.2. Regional Heterogeneity of Reactive Relocation Actions | |
| <i>2.2.1. Differing Scenarios: An Appraisal of Accomplished Relocations in the Region</i> | |
| <i>2.2.2. Differential Factors: Geographical, Political and Socio-Cultural Dissimilarities of Pacific Island States</i> | |
| 3. STRUCTURING A PROPOSAL: A MULTILAYERED LEGAL-PROTECTION SCHEME FOR CLIMATE-INDUCED DISPLACEMENT IN THE PACIFIC..... | 317-334 |
| 3.1. Existing One-dimensional Approaches to Climate-Induced Displacement: A Relevant but Incomplete Benchmark | |
| <i>3.1.1. Relevant Diagnosis and International Legal Regimes Analysed</i> | |
| <i>3.1.2. Limited Normative and Institutional Solutions Proposed</i> | |
| 3.2. Multidimensional Legal-Protection Scheme for a Heterogeneous Factual Landscape: A New Integrative and Pluralistic Proposal | |
| <i>3.2.1. Widening the Spectrum: A Myriad of Potentially Applicable International Legal Regimes</i> | |
| <i>3.2.2. (Re)-Introducing the Role of the State in the Configuration of a Legal Protection in Climate-Induced Relocation</i> | |
| 4. SPECIFYING THE PROPOSAL'S LEGAL CONTENT: FRAGMENTED AND FLEXIBLE REGULATION FOR CLIMATE-INDUCED MIGRATION IN THE PACIFIC..... | 335-357 |
| 4.1. Statehood Not at Risk: National Climate-Induced Displacements in Pacific Island States | |
| <i>4.1.1. Legal Framework in a Preventive Phase: Preservation of Basic Habitability Conditions</i> | |
| <i>4.1.2. Legal Framework in a Reactive Phase: Recognition of Housing, Land and Property Rights</i> | |
| 4.2. Endangered Statehood? Transnational Climate-Induced Displacements between Pacific Island States | |
| <i>4.2.1. Legal Framework for Ongoing Partial De-population Scenarios: International Refugee and Migration Law and Complementary Human Rights Treaty Law</i> | |
| <i>4.2.2. Legal Framework for Prospective Total De-population Scenarios: From Homelessness to Statelessness?</i> | |
| 5. CONCLUSIONS..... | 357-360 |

CHAPTER 6

CLIMATE CHANGE IMPACTS AND PACIFIC ISLANDS' GOVERNMENTAL CAPACITY: FIGHTING FOR THE CONTINUATION OF STATEHOOD THROUGH POLITICAL ACTION?

| | |
|--|---------|
| 1. INTRODUCTION | 362-366 |
| 2. THE 'INDOORS CHALLENGE': IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLAND STATES' GOVERNMENTAL CAPACITY | 366-382 |
| 2.1. Limited Governmental Response Capacity to Scenarios of Partial De-territorialization and De-population: From 'Vulnerable' to 'Failed' States? | |
| 2.1.1. <i>'Failing', 'Failed' or 'Collapsed' States: Controversial Labels Challenging Formal Sovereign Equality</i> | |
| 2.1.2. <i>From 'Failed States' to Extinction of Statehood: The Big Gap</i> | |
| 2.2. Scenarios of Total De-territorialization and De-population: Pacific Island Governments in Exile? | |
| 2.2.1. <i>Governments in Exile: An Uncontroverted Concept in International Law</i> | |
| 2.2.2. <i>The Real Threat to the Continuation of Pacific Island States: Conjunction of the Challenges to the Three Dimensions of Statehood</i> | |
| 3. THE 'OUTDOORS CHALLENGE': IMPACT OF CLIMATE CHANGE ON PACIFIC ISLANDS' CAPACITY TO MAINTAIN INTERNATIONAL RELATIONS | 382-391 |
| 3.1. Pacific Island States in the International Community | |
| 3.1.1. <i>Contrasting Faces: Limited National Governmental Capacity vs. Active Participation in International Life</i> | |
| 3.1.2. <i>Back to the Climate Change and International Security Discourse: A Prelude to Pacific Island States' Claim to Their Own Continuation?</i> | |
| 3.2. The International Community and Pacific Island States | |
| 3.2.1. <i>Past Structural Transformations of the International Community: Their Reflection in the Creation of Pacific Island States</i> | |
| 3.2.2. <i>Present Looming Transformations of the International Community: A Reflection on the Treatment of Pacific Island States' Challenges to the Continuation of Statehood?</i> | |
| 4. A PLEA FOR THE CONTINUATION OF PACIFIC ISLANDS' STATEHOOD: LEGAL AND ETHICAL GROUNDS | 391-405 |
| 4.1. Legally Based Avenues: State Responsibility and Liability for Climate Change Damage | |
| 4.1.1. <i>Duty to Prevent, and Compensation for, Transboundary Air Pollution: A Principal Remedy for Climate Change Damage</i> | |
| 4.1.2. <i>The Maintenance of the Recognition of Pacific Islands' Statehood: A Subsidiary Remedy for Climate Change Damage?</i> | |
| 4.2. Ethically Based Avenues: Exploring and Contextualizing Streams of Environmental Justice | |
| 4.2.1. <i>The Threat to Pacific Islands' Statehood: A Global, Southern and Post-Colonial Issue</i> | |
| 4.2.2. <i>The Turn to the Peoples: the Future of Pacific Islands' Statehood in the Light of Pacific Islanders' Right to Self-Determination?</i> | |
| 5. CONCLUSIONS | 406-408 |

CONCLUSIONS

| | |
|---|---------|
| 1. The Climate Change and International Security Discourse: The Political Representation of Pacific Islands' Struggle for Survival as States..... | 409-415 |
| 2. Legal Consequences of Climate Change Impacts on Pacific Islands' Statehood: Multidimensional Effects and Contextually Dependent Outcomes | 415-422 |

CONCLUSIONES

| | |
|--|---------|
| 1. El Discurso del Cambio Climático y la Seguridad Internacional: Representación Política de la Lucha de las Islas del Pacífico por su Supervivencia como Estados..... | 423-430 |
| 2. Consecuencias Jurídicas de los Impactos del Cambio Climático en la Estatalidad de las Islas del Pacífico: Efectos Multidimensionales y Resultados Coyunturales..... | 430-438 |

| | |
|---------------------------|---------|
| <u>BIBLIOGRAPHY</u> | 439-479 |
|---------------------------|---------|

| | |
|----------------------------|-----|
| <u>LIST OF CASES</u> | 480 |
|----------------------------|-----|

| | |
|-----------------------------|-----|
| <u>LIST OF TABLES</u> | 481 |
|-----------------------------|-----|

SUMMARY

The still on-going negotiations on the future of the international regime on climate change for the period post-2012 have compelled negotiators to consider climate change effects in today's multiple and (now undeniably) real manifestations. In this context, the 'sinking island paradigm' has emerged as one of the latest and perhaps most paradigmatic images of today's post-modern global environmental crisis. International legal scholars have thus gradually come to embrace the looming threat of State extinction due to climate change impacts as an unprecedented and challenging issue deserving close examination. Yet, most studies have in common 1/ the use scientific data on sea-level rise projection as the benchmark legitimizing the study of this issue; and 2/ the use of a disaggregated approach on the effects of climate change by authors who generally focus on the consequences of climate change in only one of the tree dimensions of the State at a time (effects of sea level rise on island States' maritime rights, decrease of habitability conditions prompting population displacement or the prospect of government relocation). As a result, the question of State extinction is generally by-passed or conceived as a marginal question merely *connected with* the effects of climate change in only *one* of these dimensions.

This thesis engages with these two characteristics of current studies on State extinction for climate change impacts and proposes to approach the issue through a new methodological and structural blueprint. The purpose of the thesis is not to predict or resolve the question of *whether* the international legal personality of low-lying island States will get extinct as the material substratum of the State (namely, its territory, population and government) gradually crumbles. Considering whether a 'metaphysical State' could one day see the day of light seems, at this point, a premature endeavour. Rather, this thesis seeks to point out at the *relevant factors* that one day may - and should- be used to resolve such question, and also demonstrate the extent to which some of such factors are already available in the international political sphere.

Part I of the thesis departs from one main argument, namely, that State extinction for climate change impacts is a matter that ought to be (re)anchored in the realm of international politics regardless of the scientifically measurable nature of the phenomenon, for the State is, fundamentally, a political construct - with sovereignty as its distinctive legal attribute. Indeed, since the creation of States operates in the political realm, the same can be presumed for the question of extinction of States; and thus, taking stock of the view that the international community already has on the matter may prove to be a determinant factor of its resolution.

The interpretation, understanding and consequent construction of interests that States have made about this issue is analysed and explained in detail, in Chapters 1 to 3, through the reconstruction of what is referred to as the Climate Change and International Security Discourse. This Discourse, developed in parallel to the mainstream climate change negotiations, is a ten-year-old political move, involving a great majority of State actors, and which has been institutionalized and circulated through a wide range of regional and global international organizations.

Chapter 1 begins by showing how the Climate Change and International Security Discourse can be conceived as a 'revival' of a political process started in the 1980s by the Soviet Union, which sought to link the spheres of 'environment' and 'security' as an alternative strategy to the arms race, and introduced the concepts of 'international ecological security' into the agenda of the United Nations. It then considers how the concept of environmental security, which evolved after the end of the Cold War outside the United Nations framework, developed in the 'security studies' doctrinal circles. Important theoretical and empirical studies emerged in the 1990s (including opposing voices), reinforcing the link between environment and security and providing a basis for the Climate Change and International Security Discourse which was yet to come.

Chapter 2 thus marks the point of departure of the 'second wave' of the environment and security link within the specific context of climate change. It maps the birth, circulation and limits of the Climate Change and International Security Discourse within and among regional organizations, showing how it emerged from hegemonic regions (the Euro-Atlantic Axis) and was then disseminated to the regional organizations of the most vulnerable regions – notably the Pacific Islands Forum and the African Union – while remaining unabsorbed by emerging regions less likely to suffer extreme climate change impacts, who oppose the movement and fight to maintain the climate change global discourse within the mainstream UNFCCC–KP framework.

Then, Chapter 3 moves on from the regional level of analysis to the universal level, reconstructing the introduction of the Climate Change and International Security Discourse into the policy agenda, and the operation, of the two core organs of the United Nations: the Security Council (UNSC) and the General Assembly (UNGA). Most importantly, Chapter 3 shows that the latest understanding of the Climate Change and International Security Discourse, as widely approved by a majority of States, can be reduced to one fundamental issue: the threat of climate change to the survival of low-lying island States.

Part II thus operates a shift from the political or 'pre-normative' level of analysis to the formulation of a legal question and analyses how the elements of statehood are challenged by climate change effects through the study of Pacific Island States, major co-promoters of the Climate Change and International Security Discourse and region where three out of the four low-lying island States – all with a maximum altitude of less than 5 metres – are located (Kiribati, Tuvalu and the Marshall Islands). The analysis of the effects of climate change on Pacific Island States is thus carried out through a division of three main dimensions of statehood.

Firstly, Chapter 4 deals with the effects of climate change on Pacific islands' territory – referred to as the 'de-territorialization challenge' – including how climate change may affect the maritime entitlements of these often called 'Ocean States'. A genealogical study of the meaning of territory in international law first indicates that, just as the nature of the State – a privileged habitat of the territory – goes beyond the realm of law, the place of territory in international law is equally unsettled and its nature doubtful from a legal perspective. In the case of post-colonial Pacific Island States, the territory was a vehicle for expressing or manifesting the right of Pacific island peoples to self-determination and political independence from former colonial domination. This particular meaning explains why they were granted statehood in spite of their very limited land area (as opposed to very big maritime spaces), and shows how the existence of a solid normative ground may balance and even supersede the viability requirement. This Chapter also introduces the question of whether completely de-territorialized nations may still survive as independent sovereign entities, through the analysis of two precedents: the Holy See and the Order of Malta, whose current atypical status shows that there is room and flexibility in international life allowing a typology of subjects of the international legal system - as long as strong historical and political reasons support this special treatment. It is also a reminder that, sovereignty and statehood may come together, or be set apart, if necessary, to acknowledge the existence of a special political entity that plays a positive role in the international community.

The continuation of Pacific island sovereignty and/or statehood, even in extreme cases of total territorial loss, may be justified by the role played by the second dimension of the State, namely, the population, since a sovereign political entity with international legal personality may result first from its total or acute de-population, before total submergence ensues. Chapter 5 thus considers the implications of climate change impacts on Pacific islanders. After a comparative analysis of the climate-induced relocations already accomplished in the region and a critique of how climate-induced displacement has so far been dealt with in international

legal scholarship, it proposes an alternative approach to the legal-protection tools which have so far been developed. The proposal consists on conceptualizing the legal protection of Pacific islanders within a *multilayered legal protection scheme*, which axis and main structural variable is the question of the continuation of the State; the idea that fate of Pacific islanders and the eventual legal protection they may have cannot be detached from the fate of their State of origin is thus highlighted.

Although this fundamental and structuring question – whether and when Pacific island statehood may become extinct – remains outstanding, it is clear that in all stages and scenarios covered by the multilayered legal protection scheme, the action and presence of the political dimension of the State is fundamental. Chapter 6 is finally devoted to a study of the effects of climate change on Pacific islands' governmental capacities, both nationally and internationally. Considering the literature on 'failed States' and governments in exile, it first deals with the scenario in which governments of Pacific Island States may be obliged to evacuate State territory (referred to as *ex situ* governments). Ultimately, as the three dimensions of Pacific islands' statehood may be challenged at any time, this closing Chapter explores the role to be played by different normative and political avenues which will determine their continuation as States. From a politico-legal perspective, these include, most notably, the claims to the continuation of statehood made by the affected States– and revealed by the Climate Change and International Security Discourse–, the corresponding reactions of other States through international recognition, and possibly the outcome of Pacific islanders' right to self-determination on the future organization of their communities. Yet, may these factors come up in the real political scenario, when a more pressing time crystallizes, and influence the contingencies of the moment, two ethical constraints should also play a determining role: the ethical compromise of the international community vis-à-vis future generations, and the need not to disregard the fact that today's present vulnerable condition of Pacific Island States is bound to the history of their colonial occupation by certain industrialized countries.

RESUMEN

Las negociaciones sobre el futuro de régimen internacional sobre cambio climático para el periodo post-2012 han forzado a los negociadores a considerar los efectos del cambio climático en sus múltiples – y ahora innegablemente reales – manifestaciones. En este contexto, el surgimiento del ‘paradigma del hundimiento de los Estados insulares’ (denominado en inglés ‘*the sinking island paradigm*’) se ha constituido como una imagen particularmente paradigmática y representativa de la actual crisis medioambiental global. Así, internacionalistas del mundo académico han ido por tanto gradualmente abordando la cuestión de la amenaza de extinción del Estado como resultado de los impactos del cambio climático como un desafío sin precedentes y merecedor de escrutinio doctrinal.

No obstante, la mayoría de los estudios hasta ahora desarrollados tienen dos características en común: 1/ el uso de datos científicos sobre la proyección del aumento del nivel del mar como punto de partida sobre el que legitimar el estudio de esta cuestión; y 2/ el uso de una aproximación desagregada sobre los efectos del cambio climático, que centra el estudio de estos impactos en tan solo una de las tres dimensiones del Estado (efectos del aumento del nivel del mar en los derechos sobre los espacios marinos de los Estados insulares, por un lado; descenso de las condiciones de habitabilidad, dando lugar a desplazamientos de la población, por otro lado; o bien la posibilidad de relocalización del gobierno en el extranjero). Como resultado, la cuestión de la extinción del Estado es generalmente eludida o concebida como una cuestión marginal, si acaso, meramente *conectada* con los efectos del cambio climático en tanto solo *una* de las tres dimensiones del Estado.

Esta tesis aborda estas dos características de los estudios actuales sobre extinción del Estado producida por los impactos del cambio climático y propone una aproximación metodológica y estructural innovadora. El propósito de esta tesis no es predecir o resolver si la personalidad jurídica internacional de los Estados insulares de baja altitud se extinguirá en la medida en que el sustrato material del Estado (es decir, su territorio, población y gobierno) acaben desintegrándose gradualmente. Proyectar y establecer la posibilidad de que un ‘Estado metafísico’ pueda, algún día, hacerse realidad en la esfera internacional parece, en este momento, un objetivo prematuro. Por tanto, esta tesis propone únicamente indicar los *factores relevantes* que pudieran – y debieran- un día ser utilizados para resolver dicha

incógnita. También se propone demostrar en qué medida algunos de estos factores se encuentran ya disponibles en la esfera política internacional.

La primera parte de esta tesis parte de un argumento principal – a saber, que la extinción del Estado por los efectos del cambio climático es un problema que debe ser (re) asignado o (re)ubicado en el ámbito de la política internacional, con independencia de la naturaleza científicamente calibrable del fenómeno, puesto que el Estado es, fundamentalmente, fruto de una construcción política – siendo la soberanía su atributo jurídico distintivo. En efecto, dado que el proceso de creación de los Estados opera en el ámbito político, esta misma característica puede igualmente presumirse en materia de extinción de los Estados; así, hacer balance de la visión que la comunidad internacional tiene en este momento sobre este problema puede resultar ser un elemento determinante para su resolución. La interpretación, comprensión y consecuente construcción de los intereses que los Estados han llevado a cabo sobre esta materia es analizada y explicada detalladamente, en los capítulos 1 a 3, a través de la reconstrucción del llamado Discurso del Cambio Climático y la Seguridad Internacional. Este Discurso, desarrollado en paralelo a las negociaciones del clima, es un movimiento político que data de hace diez años, incorpora a una gran mayoría de actores estatales, y ha sido institucionalizado y circulado a través de un gran elenco de organizaciones internacionales, tanto de corte regional como global.

El Capítulo 1 abre la tesis mostrando cómo el Discurso del Cambio Climático y la Seguridad Internacional puede ser concebido como el resurgimiento de un proceso político iniciado en los años 80 por la Unión Soviética, cuyo objetivo entonces fuera vincular las esferas del medioambiente y la seguridad como alternativa a la estrategia de seguridad basada en la carrera armamentística entonces dominante, y que dio como fruto conceptual la introducción de la noción de ‘seguridad ecológica internacional’ o seguridad ambiental en la agenda de Naciones Unidas. Prosigue considerando cómo el concepto de seguridad ambiental, cuya evolución tras el final de la Guerra Fría tuvo lugar fuera del marco de Naciones Unidas, continuó su desarrollo en el seno de los círculos doctrinales y escuela dedicadas a los estudios sobre seguridad (siendo esta nueva disciplina conocida en inglés como ‘*international security studies*’). Importantes estudios teóricos y empíricos emergieron así en los años 90 (voces discordantes incluidas), que reforzaron el vínculo entre el medioambiente y la seguridad y establecieron las bases para el futuro surgimiento del Discurso del Cambio Climático y la Seguridad Internacional.

El Capítulo 2 establece el punto de partida de esta segunda etapa en la asociación de las esferas del medioambiente y la seguridad internacional, ubicándolo en el contexto específico

del cambio climático. Delinea la historia del surgimiento, la circulación y los límites del Discurso del Cambio Climático y la Seguridad Internacional dentro y entre organizaciones regionales. Muestra cómo este Discurso es un producto narrativo que emergió de las regiones hegemónicas (o ‘Eje Euro-Atlántico’), para ser posteriormente diseminado hacia las organizaciones regionales de las regiones más vulnerables a los impactos del clima— en particular, al Foro de las Islas del Pacífico y la Unión Africana—; quedando al margen de la regiones emergentes con menor probabilidad de sufrir los impactos del cambio climático en su versión más extrema, que se oponen a este movimiento y luchan para mantener el discurso global del cambio climático dentro de la vía principal del Convenio Marco de Naciones Unidas para el Cambio Climático y el Protocolo de Kioto.

El Capítulo 3 pasa del nivel regional de análisis al nivel universal, reconstruyendo la introducción del Discurso del Cambio Climático y la Seguridad Internacional en la agenda política de los dos órganos principales de las Naciones Unidas: el Consejo de Seguridad (CSNU) y la Asamblea General (AGNU). El aspecto más relevante de este capítulo es que muestra que, cómo resultado del proceso de absorción, discusión y progresiva re-significación del Discurso del Cambio Climático y la Seguridad Internacional en estos órganos, aprobada y adoptada por la mayoría de los Estados, este Discurso a llegado finalmente a cristalizar una cuestión fundamental: la amenaza que el cambio climático supone para la supervivencia de los Estados insulares de baja altitud.

La segunda parte de la tesis opera por tanto un cambio de nivel de análisis político o ‘pre-normativo’, a la formulación de una cuestión jurídica, y se propone analizar los efectos del cambio climático en las tres dimensiones del Estado (la dimensión espacial —el territorio; la dimensión humana — la población; y la dimensión política — el gobierno) a través del estudio concreto del caso de los Estados insulares del Pacífico. La elección de esta región de muestra se debe a que, por un lado, estos Estados son los principales co-promotores del Discurso del Cambio Climático y la Seguridad Internacional en los órganos de Naciones Unidas, y, por otro lado, sólo en esta región se encuentran ubicados tres de los cuatro Estados insulares del mundo únicamente compuestos por atolones de altitud inferior o igual a 5 metros, para quienes la amenaza de extinción es más acuciante. Estos Estados son Kiribati, Tuvalu y las Islas Marshall, siendo las islas Maldivas el cuarto Estado amenazado, y situado en el Océano Índico. El análisis de los efectos del cambio climático en los Estados insulares del Pacífico y la amenaza de extinción que estos suponen es llevado a cabo en los capítulos 6 a 8, cada uno correspondiente a una de las tres dimensiones del Estado.

En primer lugar, el Capítulo 4 aborda los efectos del cambio climático en el territorio de las islas del Pacífico – referido como ‘el desafío de la des-territorialización’, incluyendo en el estudio de la dimensión espacial cómo el aumento del nivel del mar puede afectar a los derechos sobre los espacios marinos de estos Estados, a menudo llamados ‘Estados oceánicos’. Un estudio genealógico del significado del territorio en Derecho internacional indica en primer lugar que, así como la naturaleza del Estado – hábitat privilegiado del territorio- traspasa el ámbito del Derecho, el papel del territorio en Derecho internacional es igualmente indefinido y su naturaleza dudosa desde una perspectiva jurídica. En el caso de los Estados insulares post-coloniales del Pacífico, el territorio fue un vehículo para expresar o manifestar el Derecho de los pueblos insulares del Pacífico a la auto-determinación e independencia política de la dominación colonial. Este significado particular explica por qué les fue otorgada la condición de Estado a pesar de su limitada área terrestre (que contrasta con sus amplios espacios marítimos), y muestra cómo la existencia de una base normativa sólida puede equilibrar e incluso superar la condición ‘práctica’ de la viabilidad. Este capítulo plantea igualmente la cuestión de si naciones completamente des-territorializadas podrían, no obstante, sobrevivir como entidades soberanas independientes. Para ello, realiza un análisis de dos precedentes: la Santa Sede y la Orden de Malta, cuyo actual estatuto atípico revela cómo la esfera internacional es capaz de tolerar con flexibilidad la existencia de una tipología si acaso, heterogénea, de los sujetos del sistema jurídico internacional; ello siempre y cuando razones de peso histórico y/o político justifiquen y avalen dicho tratamiento especial. El caso de estos dos precedentes es también un recordatorio de que soberanía y estatalidad pueden venir de la mano, o existir con independencia la una de la otra, si dado el caso fuera necesario para reconocer la existencia de una entidad política especial que juega un papel positivo en la comunidad internacional.

La continuación de la soberanía y/o estatalidad de las islas del Pacífico, incluso en casos extremos de pérdida territorial, puede encontrar justificación en el papel que juega la segunda dimensión del Estado, es decir, la población, dado que la extinción de una entidad política soberana con personalidad jurídica internacional puede resultar, en primer lugar, de su total o marcadamente acentuada despoblación, antes incluso de que quedar totalmente sumergida. El capítulo 5 considera por tanto las implicaciones de los impactos del cambio climático en los habitantes de las islas del Pacífico. Tras realizar un análisis comparativo de las relocalizaciones inducidas por el cambio climático ya acaecidas en la región, y criticar cómo los desplazamientos inducidos por el fenómeno han sido hasta ahora tratados en la doctrina internacionalista, este capítulo propone una aproximación alternativa a los instrumentos de

protección jurídica hasta el momento desarrollados. La propuesta consiste en conceptualizar la protección jurídica de los habitantes de las islas del Pacífico dentro de un esquema de protección jurídica multi-nivel, cuyo eje y variable estructural sea la cuestión de la continuación del Estado. La idea de que el destino de los habitantes de las islas del Pacífico y su eventual protección jurídica no puede desvincularse del destino de su Estado de origen es por tanto particularmente señalada.

A pesar de que esta cuestión fundamental y estructural – si los Estados insulares del Pacífico llegarán a extinguirse y, en caso afirmativo, en qué momento podrá considerarse que este fenómeno tuvo lugar – permanece sin resolver, queda claro que en todas las etapas y escenario cubiertos por el esquema de protección jurídica multi-nivel, la acción y presencia de la dimensión política del Estado es fundamental. El capítulo 6 está finalmente dedicado al estudio de los efectos del cambio climático en las capacidades gubernativas de los Estados insulares del Pacífico, tanto a nivel nacional como internacional. Considerando la literatura sobre ‘Estados fallidos’ y gobiernos en el exilio, comienza por adentrarse en el escenario en el que los gobiernos de las islas del Pacífico puedan verse obligados a evacuar el territorio del Estado (denominados en este capítulo ‘gobiernos *ex situ*’). En última instancia, cuando las tres dimensiones de la estatalidad de las islas del Pacífico son desafiadas al mismo tiempo, este capítulo de cierre explora el papel que juegan las distintas salidas normativas y políticas que determinarán su continuación como Estados. Desde una perspectiva político-jurídica, estas posibilidades incluyen, en particular, la reivindicación de continuación de la estatalidad realizadas por los Estados afectados – y revelados por el Discurso del Cambio Climático y la Seguridad Internacional –; las reacciones correspondientes de otros Estados a través del reconocimiento internacional; y, posiblemente, el resultado del derecho de auto-determinación de los habitantes isleños del Pacífico sobre la futura organización de sus respectivas comunidades. Por ende, si estos factores llegaran a surgir en el escenario político real, cuando la presión material se cristalice, e influyeran las contingencias del momento, dos constricciones éticas debieran igualmente jugar un papel determinante. Por un lado, el compromiso ético suscrito por la comunidad internacional con relación a las futuras generaciones; y, por otro, la necesidad de no menospreciar el hecho de que la actual condición de vulnerabilidad de los Estados insulares del Pacífico está íntimamente vinculada – e incluso es en parte resultado – del pasado de dominación colonial ejercida por países industrializados.

INTRODUCTION

'All Science should be scholarly, but not all scholarship should be rigorously scientific. [T]he terrae incognitae of the periphery contain fertile ground awaiting cultivation with the tools and in the spirit of the humanities.'

John Kirtland Wright, *Terrae Incognitae: The Place of Imagination in Geography*, 1947.

1. Climate Change, International Security and the State at a Crossroads

Both the State and international security are topical in international law and have been thoroughly studied by international legal scholars for at least the past four centuries. Climate change, in contrast, has only been identified as a distinguishable scientific phenomenon for the past four decades.¹ How has the oldest and perhaps most paradigmatic figure of the post-Westphalia international legal system as the State and its security come across a fairly recent and still contested phenomenon such as climate change? At the heart of this puzzle lies the original impetus of this thesis.

The eruption of climate change as an issue deserving international political attention and eventually demanding international action has gone through progressive stages of development.² At the onset of the history of climate change in international relations lies the birth of ecological political movements in western countries, which arguably served as the cradle of the concern about the excesses of industrialization.³ Such initial preoccupation became more solidly grounded as scientific knowledge about global warming and climate change began to develop. Far from being a merely opportunistic political construct serving other, wider, related causes (such as peace), the existence of climate change began to be acknowledged on the international scene as a scientifically proven disruption of the natural climate cycle resulting – at least to some extent – from human action.⁴ Certainly, since the

¹ See S. R. WEART, *The Discovery of Global Warming*, 2003, (Cambridge, Mass.: Cambridge University Press).

² See D. DOBANSKY, *The Art and Craft of International Environmental Law*, 2010, (Cambridge, Mass.: Harvard University Press), pp. 18-37; more specifically on the three stages of the climate-change regime. J. VIÑUALES, 'Balancing Fairness and Effectiveness in the Redesign of the Climate Change Regime', (2011) *Leiden Journal of International Law*, vol. 24, issue 1, pp. 223-252.

³ See J. DRYZEK, *The Politics of the Earth: Environmental Discourses*, 1997, (New York: Oxford University Press) at 51.

⁴ While the first studies on climate change science date back to the late-19th century, it was not until the 1990s that broad (though still contested) consensus within the scientific community was reached

early stages of development of climate change science, 'cornucopian' voices were raised denying both the link between the cause – industrial growth – and the effect – disruption in the natural climate cycle – on the one hand, and the very existence of environmental limits to industrial growth altogether, on the other hand.⁵ Yet, these voices lacked the strength to stop the international community from beginning to develop collective concerted action to halt climate change and react against its impacts. In this context, the creation in 1988 of the UNEP–WMO Intergovernmental Panel on Climate Change played a crucial role in neutralizing the potential effects of climate change sceptics, as it legitimized the development of international co-operation on this matter and served as the source of scientific knowledge officially recognized by a great number of States.⁶ A few years later, concerted action materialized with the adoption at the United Nations Conference on Environment and Development (Rio de Janeiro, 1992) of the multilateral environmental agreement specifically designed to deal with the issue, namely, the United Nations Framework Convention on Climate Change (UNFCCC).⁷

Since the adoption of this instrument, the international regime on climate change has developed exponentially, complemented by a large number of decisions adopted by the successive Conferences of the States Parties to the UNFCCC, including the adoption, in 1997, of the Kyoto Protocol, which established specific emission-reduction targets for industrialized countries. The three main characteristics of international co-operation on climate change in the past two decades should therefore be highlighted. First of all, climate change has been conceptualized as a double-edged issue, constituting as much an environmental problem as a challenge to developmental needs, as reflected in the underlying principles grounding the

acknowledging the influence of man-made greenhouse gas emissions in the Earth's climate system. The reports of the Intergovernmental Panel on Climate Change, created in 1988, provided a solid institutional grounding for scientific studies on these lines to develop further. Besides, scientific studies have exponentially developed in parallel to the work undertaken by the IPCC in a framework more distant to the political context in which the studies of the IPCC necessarily operate. Such studies, conducted for instance by physics and geologists, give broader accounts of the evolution of the Earth's climate system by covering successive geological eras. In this sense, see for instance the works of J. ZALASIEWICZ, *The Earth After Us*, 2009, (Oxford: Oxford University Press); as well as J. ZALASIEWICZ and M. WILLIAMS, *The Goldilocks Planet: the 4 Billion Year Story of Earth's Climate*, 2012, (Oxford: Oxford University Press).

⁵ See, for instance, B. LOMBERG, *The Skeptical Environmentalist: Measuring the Real State of the World*, 2001, (Cambridge, UK: Cambridge University Press).

⁶ On the creation of the IPCC as a scientific body working in a political context, see for instance F. SOLTAU, *Fairness in International Climate Change Law and Policy*, 2011, (Cambridge, UK: Cambridge University Press), pp. 21-48.

⁷ United Nations Framework Convention on Climate Change, adopted on 9 May 1992, entered into force on 16 February 2005, 1771 UNTS 164.

regime and structuring it.⁸ Secondly, until very recent years, international efforts have been largely focused on the development of concerted *mitigation*, relegating adaptation to a secondary role.⁹ Thirdly, and consistent with the generally inseparable conceptual bond between the environmental and developmental rationales, the timid pace of development of adaptation has been directly linked to the analytical framework of development.

Today's still on-going negotiations on the future of the international regime on climate change for the period post-2012 have compelled negotiators to take into account the reality of climate change effects in its multiple manifestations, to consider the new state of the international political arena, and correlatively to evaluate whether it might be necessary to revisit some of the conceptual foundations of the regime.¹⁰ Paradoxically, now that the

⁸ The principle of common but differentiated responsibilities, firstly stipulated in Principle 7 of the Rio Declaration on Environment and Development and also enshrined in Article 3.1 of the UNFCCC, is perhaps the most illustrative structuring principle of the double-edged nature of the international regime on climate change. According to it, while all States share the common responsibility to protect the global environment, industrial countries bear the primary responsibility due to: 1/ their historical responsibility in creating climate change; and 2/ the differing capacities of developing States to take remedial measures. As explained by Lavanya Rajamani, based on this principle, the UNFCCC contains a 'balance of commitments' whereby developing (non Annex I) countries are required to develop in a sustainable manner and address the negative impacts of climate change through adaptation, while industrial (Annex I) countries are required to address climate change through mitigation commitments and for some industrial (Annex II) countries to also share the burden of financing developing countries' adaptation measures. See L. RAJAMANI, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Change Regime', (2000) *Review of European Community and International Environmental Law*, vol. 9, pp. 120-131, at 125.

⁹ Ten years after the adoption of the UNFCCC and five years after the adoption of the Kyoto Protocol, Roda Verheyen still considered that '*the law on adaptation is still in its infancy*', in R. VERHEYEN, 'Adaptation to the Impacts of Anthropogenic Climate Change – The International Framework', (2002) *Review of European Community and International Environmental Law*, vol. 2, pp. 129-143, at 129. Since then, however, climate-change adaptation has received two major boosts. The first one stemmed from the adoption in 2006 of the Nairobi Work Programme, which tasked the Subsidiary Body for Scientific, Technological and Technical Advice to address the impacts, vulnerability and adaptation to climate change during a five year project. This has been recently complemented by the adoption in 2010 of the Cancun Adaptation Framework, opening a process that will enable Least Developed Countries to formulate and implement national adaptation plans, develop work programmes to address loss and damage derived from climate change impacts and even establish an Adaptation Committee.

¹⁰ Amongst the most blatant attacks against the consideration of fairness issues in the international regime on climate change for the period post-2012 lies the attack from the law and economics movement of the Chicago Law School, as notably developed in E. POSNER and D. WEISBACH, *Climate Change Justice*, 2010 (Princeton, N.J.: Princeton University Press). Specifically arguing against three core arguments displayed in Posner and Weisbach's book, see M. PROST and A. TORRES CAMPRUBI, 'Against Fairness? International Environmental Law, Disciplinary Bias and Pareto Justice', (2012) *Leiden Journal of International Law*, vol. 25, issue 2, pp. 379-396. Broader scholarly accounts from the Third World Approaches to International Law movement, specifically focusing on the environmental field, complete the alternative view to that of the Chicago Law School. In this sense, see for instance, A. NAJAM, 'Why Environmental Politics Looks Different from the South', in P. DAUVERGNE (ed.), *Handbook of Global Environmental Politics*, 2005, (Northampton, UK: Edward Elgar Pub.), pp. 111-117; V. ARGYROU, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality*, 2005, (New York: Bergham Books); U. NATARAJAN, 'TWAIL and the Environment: The State of Nature, the Nature of the State and

existence of adverse effects of climate change is no longer subject to uncertain and unscientific predictions, but constitutes a present reality, the prospective image of international co-operation on climate change has become more blurred. The limits of the last twenty years of international efforts to combat the impacts of climate change are indeed surfacing and the international regime on climate change, traditionally considered as an illustration of the inherently progressive agenda of international environmental law, is gradually being marked and referred to by, its failures rather than by the accomplishments it once achieved.¹¹ Most importantly, despite the fact that, since the turn of the new millennium, the focus of the international regime on climate change may be said to be shifting towards the development of concerted action on adaptation rather than mitigation, the present on-going climate change negotiations are revealing the unsuitability of the UNFCCC legal framework on adaptation to tackle the adverse impacts of climate change effectively.

And yet, in contrast, the looming crisis in mainstream international co-operation on climate change is serving as the benchmark for a bloom of innovative approaches to the issue of climate change. On the one hand, a new highly controversial and rather dangerous look on mitigation has fostered investment in geo-engineering research programmes which propose to counter certain impacts by physically interfering with the climate system.¹² On the other hand, alternative approaches on how to deal with the adverse impacts of climate change have been

the Arab Spring', (2012) *Oregon Review of International Law*, vol.14, pp. 177-202; and K. MICKELSON, 'Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation', (2005) *Osgoode Hall Law Journal*, vol. 43, issue 1, pp.137- 170.

¹¹ Literature on the failure of the UNFCCC COP.15/MOP.5 is very dense. For a particularly sharp illustration, see D. BODANSKY, 'The Copenhagen Climate Change Conference: a Post-Mortem', (2010) *American Journal of International Law*, vol. 104, issue 2, pp. 230-240.

¹² The first incursions into the field of geo-engineering have particularly arisen in the United Kingdom since the publication in 2009 of the Oxford Principles on Geo-engineering Research, authored by Steve Rayner, Tim Kruger and Julian Savulescu from the Oxford Geo-engineering Programme, along with Catherine Redgwell (University College London) and Nick Pidgeon (University of Cardiff). According to the presentation of the principles laid down in the Oxford Geo-engineering Programme's official website, available at: <<http://www.geoengineering.ox.ac.uk/oxford-principles/history/>>, the five overarching principles suggested by the authors are intended to 'guide the development of geoengineering techniques from early research to the point where they may be available for eventual deployment', and also insist on the fact that 'any decision with respect to deployment may only be taken with robust governance structures already in place in order to ensure social legitimacy'. The five principles stipulate that: 1/ geoengineering should be regulated as a public good; 2/ public participation should conduct decision-making on geoengineering; 3/ there should be complete disclosure and open publication of geoengineering results; 4/ a body independent of those undertaking the research should conduct an assessment of the impacts of geoengineering techniques; and 5/ any decisions regarding the deployment of geoengineering techniques should be taken with robust governance structures already in place. These principles were then submitted to the UK House of Commons Science and Technology Select Committee. After being endorsed by the Committee, they were also adopted by the UK Government as the first UK official policy statement on the matter.

put forward in parallel to the climate change negotiations (though invariably connected to them). These new developments essentially focus on the management of climate change impacts, which are already beginning to reframe the parameters of future concerted action in this area and can be divided into two main groups: the disaster risk-reduction stream (more ancient, short-term— regulated by the Hyogo Framework for Action);¹³ and the launch of what constitutes the starting point of this thesis, which will be referred to as the Climate Change and International Security Discourse (innovative, mid-/long-term).

While acknowledging the controversial nature of directing climate change (as any other issue) to the sphere of security – traditionally characterized by the lack of legitimacy and transparency in the decision-making process, as well as by the discretionary use of power – this thesis considers that studying the Climate Change and International Security Discourse is not only justified, but also necessary.¹⁴ The thesis seeks to prove how the security approach to climate change is the result of a ten-year-old political move involving a great majority of State actors which has been institutionalized and circulated through a wide range of regional and global international organizations.¹⁵ Far from merely constituting an interim ‘rhetorical’ exercise exclusively seeking to create more pressure on the climate change negotiations, this

¹³ As legal and institutional responses to natural disasters are mainly dominated by humanitarian considerations rather than a fully fledged rights-based approach to the people affected; they are temporary in nature and highly dependent upon the discretionary will of foreign governments to assist the government and population of the State hit by the natural disaster. Nonetheless, governance structures for preventive and reactive responses to disasters have developed a lot during the last decade, particularly since the adoption in December 2009 by the UN General Assembly of the International Strategy for Disaster Reduction and the creation of the United Nations Office for Disaster Risk Reduction (UNISDR). In 2001, the mandate of the UNISDR expanded to serve the institution tasked with the co-ordination of activities for disaster reduction and help mainstream disaster risk reduction within the areas of work of the UN dedicated to economic and social development. See UNGA Res. 56/195, ‘International Strategy for Disaster Reduction’, document reference: A/RES/56/195, adopted on 21 December 2001, 90th plenary meeting. This expansion was complemented in January 2005 with the adoption of the Hyogo Declaration and the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters’, adopted by the World Conference on Disaster Reduction, in Kobe, Hyogo (Japan).

¹⁴ Some charges against the security approach to climate have highlighted the dangers of leaving room for the Security Council to expand further its scope of action; others have deplored the possible counter-productive effect of these so-called ‘alarmist’ pledges for the appropriate understanding and resolution of these issues. See for instance, J. McADAM, *Climate Change, Forced Migration and International Law*, 2012, (New York: Oxford University Press), at 4.

¹⁵ For a long time, the security approach to climate change was largely disregarded in international legal scholarship. Some very recent new accounts seeking to map the birth and evolution of this approach include S. SCOTT, ‘The Securitization of Climate Change in World Politics: How Close Have We Come and Would Full Securitization Enhance the Efficacy of Global Climate Change Policy?’ (2013) *Review of European Community and International Environmental Law*, vol. 21, issue 3, pp. 230-240; and A. OELS, ‘From “Securitization” of Climate Change to the “Climatization” of the Security Field: Three Theoretical Approaches’, in J. SCHEFFRAN, M. BRZOSKA, H.G. BRAUCH, P.M. LINK, and J. SCHILLING (eds.), *Climate Change, Human Security and Violent Conflict*, 2012, (New York: Springer), pp. 185-205.

political process is gradually permeating the agenda of several fora of inter-State co-operation. The relevance of the Climate Change and International Security Discourse is therefore not merely based on a theoretical lucubration nurtured in the solitude of academic doctoral research. Nor is it a 'futuristic' exercise intended to make up the long-term future landscape of international co-operation on climate change against the background of a devastated Earth. Rather, the Climate Change and International Security Discourse results from a solidly grounded political process, undeniably operating in present international organizations and currently giving rise to fervent discussions by a great majority of States. Yet, this thesis not only seeks to demonstrate the existence of the security approach to climate change and explain its characteristics from a political perspective, but also to reflect on the *legal* implications of climate change impacts, *as revealed by* the Climate Change and International Security Discourse. And therefore, at the core of this thesis lies one all-embracing fundamental question: **What are the international legal implications of the Climate Change and International Security Discourse, as construed by State actors working through international organizations?**

The term 'discourse' implies that a new common and distinct understanding of a previously existing issue has been developed and follows Alan Gare's point that '*the notion of a global environmental crisis is a social construct*'.¹⁶ Referring to this alternative approach to climate change as the Climate Change and International Security *Discourse* thus implies that the application of regime theory to this matter has been discarded.¹⁷ Indeed, the Climate Change and International Security Discourse does not study the interaction between two 'legal regimes' – the climate change regime and the laws governing the use of force and the collective system of international security; rather, it refers to the construction, in the political arena, of a new interpretation and understanding of the impacts of climate change. Such new understanding of climate change leads directly to the emergence of a fundamental legal issue. This thesis seeks to show how, in its latest evolution in international organizations, the Climate

¹⁶ A. E. GARE, *Postmodernism and the Environmental Crisis*, 1996, (London: Routledge). Following similar lines, see P. BLAICKIE, 'Postmodernism and Global Environmental Change', (1996) *Global Environmental Change*, vol. 6, issue 2, pp. 81-85; on how to address 'the idea of the global', see M. HUME, 'Problems with Making and Governing Global Kinds of Knowledge', (2010) *Global Environmental Change*, vol. 20, pp. 558-564.

¹⁷ S. KRASNER defined a regime as a set of explicit or implicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area. Accordingly, regime theory is an international relations theory derived from the liberal tradition and holding that co-operation among States is possible in an anarchic system, for international regimes affect State behavior in specific political contexts or 'issue areas'. See S. KRASNER, *International Regimes*, 1983, (Ithaca, N.Y.; Cornell University Press); and V. RITTBERGER and P. MAYER, *Regime Theory and International Relations*, 1993, (Oxford, UK: Oxford University Press).

Change and International Security Discourse has come to embody one single issue commonly recognized and accepted by the majority of UN Member States, namely, *how is the continuation of small islands' statehood jeopardized by climate-change impacts*. Given the inherent bias of international law towards stability and order, it does not come as a surprise that State extinction is a matter quite poorly dealt with in international legal scholarship – particularly when compared with the vast array of studies on the creation of States in international law. If anything, the issue of State extinction diverted the attention of international scholars in the context of State succession, that is, in cases when the international legal personality – rather than the material elements of the States – risked disappearing as a result of a political process.¹⁸ These cases, however, are a matter of appropriation of the governing power over a specific portion of territory and the population, rather than the extinction of such power due to the disappearance of the *material substratum* of sovereignty over which the governing power is displayed. In rare cases in which this case scenario was considered, international legal scholars simply concluded that the State disappears. For instance, in 1987, Ulrich Fastenrath wrote that '*according to international law a State becomes extinct with the disappearance of one of the criteria of statehood (territory, people and government), either because it has physically ceased to exist or has merged into a larger unit or split up into smaller units, thereby removing the social foundation of the former State*'.¹⁹ Following the same line, Matthew Craven more recently stated that '*while the territory of a State becomes submerged by the sea, or where the population of a State evacuates en masse to other territories [...] it should be possible to conclude that the State has ceased to exist*'.²⁰ However, as the voices of small island States' rise and warn about the threat that climate change constitutes for their continuation as States, new studies in international legal scholarship on this specific case scenario have begun to mushroom at an impressive pace. An emerging stream of scholars is thus beginning to put forward the idea that that international legal personality is not necessarily extinguished by the loss of the material

¹⁸ For a recent and all-encompassing account on State extinction in international law, see M. AZNAR-GÓMEZ, 'The Extinction of States', in Eva Rieter and Henri de Waele (eds.), 2012, *Evolving Principles of International Law : Studies in Honour of Karel C. Wellens*, pp. 25-51.

¹⁹ U. FASTENRATH, 'States, Extinction', (1987) *Encyclopedia of Public International Law*, vol. 10, pp. 465-467, at 465.

²⁰ M. CRAVEN, 'The Problem of State Succession and the Identity of States under International Law', (1998) *European Journal of International Law*, vol. 9, pp. 142-162, at 159.

elements of the State (territory, population and government)²¹ for – and Jane McAdam notes – in matters of State extinction, ‘*the law is not so clear-cut*’.²²

The appeal of this issue generally begins – at least among western scholars – with the reminiscence of the Atlantis legend, as so beautifully narrated by Plato in his *Dialogue to Critias*:

‘So it was that Poseidon received as one of his domains the island of Atlantis and he established dwelling places for the children he had fathered of a mortal woman in a certain place of the island that I shall describe.

Now, seaward, but running along the middle of the entire island, was a plain which is said to have been the loveliest of all plains and quite fertile. Near this plain in the middle of the island and at about fifty stads distance was a uniformly low and flat hill. [T]o make the hill on which she lived a strong enclosure he broke it to form a circle and he created alternating rings of sea and land around it. Some he made wider and some he made more narrow. He made two rings of land and three of sea as round as if he had laid them out with compass and lathe. They were perfectly equidistant from one another. And so the hill became inaccessible to humans’.

Nonetheless, while the parallel between low-lying island States and the legendary island trapped in the hands of the God of the Seas is attracting the interest of an increasing number of international scholars, most studies undertaken so far have been mainly devoted to some concrete consequences of climate change for either their territory, their population or their governmental capacity, hence considering only one of the dimensions of the State at a time. For instance, studies have been dedicated to the impacts of climate change on, inter alia, the outer maritime boundaries of low-lying island States, or to the legal implications of national and transnational displacements from refugee law and international human rights law perspectives. However, they rarely, if ever, approach these issues all together, conceptualizing them as pieces of a wider and rather puzzling problem – the continuation of statehood – and pertaining to one of the three different dimensions of the State: the geographical dimension (territory); the human dimension (population); and the political dimension (government). Climate change impacts affect all three dimensions at a time, and thus their study in isolation from the broader context may result in inappropriate or unrealistic legal conclusions or policy recommendations. It is only recently that the idea of dealing *jointly* with the challenges of

²¹ See, for instance, M. BURKETT, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’, (2011) *Climate Law*, vol. 2, issue 1, pp. 345-374; R. RAYFUSE, ‘International Law and Disappearing States: Utilizing Maritime Entitlements to Overcome the Statehood Dilemma’, (2010) *University of New South Wales Faculty of Law Research Series*, paper nº 52, pp. 1-13. See also, M. AZNAR-GÓMEZ, ‘El Estado sin Territorio: la Desaparición del Estado Debido al Cambio Climático’, (2013) *Revista Electrónica de Estudios Internacionales*, vol. 26, pp. 1-23.

²² J. McADAM, *Climate Change, Forced Migration and International Law*, *supra*, at 127.

climate change to the three dimensions of the State has begun to emerge.²³ Increased detailed and comprehensive institutional and scholarly attention is expected in the years to come, particularly since the creation at the International Law Association (ILA) of the new Committee on International Law and Sea Level Rise, chaired by Professor Davor Vidas with Professors David Freestone and Jane McAdam as co-rapporteurs, which will become operative in November 2013.²⁴

All in all, conceptualizing climate change as a phenomenon challenging the central and structural institution of international law – namely, the State – in a form never experienced since the emergence of the modern State in the 17th century may well substantiate Leigh Glover's statement that '*climate change defines modernity's end in ecological terms*'. Curiously enough, it is when the existing international regime on climate change – a paradigm of the 'law of co-operation' – fails to respond effectively to the issue at stake, that the Climate Change and International Security Discourse emerges, virtually effecting an approximation to the issue

²³ See, for instance, the very recent collective publication M. B. GERRARD and G. E. WANNIER, *Threatened Island Nations: Legal Implications of Rising Seas in a Changing Climate*, 2013, (Cambridge, UK: Cambridge University Press), as well as the book by L. YAMAMOTO and M. ESTEBAN, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty*, 2013, (Berlin: Springer). Articles dealing with the consequences of climate change on statehood include, E. CRAWFORD and R. RAYFUSE, 'Climate Change and Statehood', in R. RAYFUSE and S.V. SCOTT (eds.), *International Law in the Era of Climate Change*, 2012, (Cheltenham, UK and Northampton, Mass.: Edward Elgar), pp. 243-253; and one chapter in J. McADAM, *Climate Change, Forced Migration and International Law*, *supra*, Chapter 4 on 'Disappearing States, Statelessness and Relocation', pp. 119-158.

²⁴ See the final report of the ILA International Committee on Baselines under the International Law of the Sea, adopted at the 75th General Conference of the ILA, held in Sofia (Bulgaria), 26–30 August 2012. The report states that: '*All coastal States face the threat of territorial loss as a result of predicted sea level rise. When coastal territory submerges below the selected low-water datum, the normal baseline would retreat, and in extreme cases would be lost. As indicated in the proposal establishing this Committee, low-lying, small-island developing states are likely to be the most severely affected by this phenomenon. If current predictions of sea level rise are realized, some States will become completely submerged. The resulting deterritorialization will likely mean, among other things, a total loss of baselines and of the maritime zones generated by coastal territory and measured from those baselines. Should the issue of deterritorialization fail to be considered by the international community at least in part as a baseline issue, the existing law of the normal baseline does not offer an adequate solution [...] but the loss of a State's territory to rising sea levels is not primarily a baseline or law of the sea issue. Substantial territorial loss is a much broader issue encompassing concerns of statehood, national identity, refugee status, state responsibility, access to resources, and international peace and security. This issue requires consideration by a committee established for the specific purpose of addressing this range of concerns*'.²⁴ Following the adoption of its final report, the Committee on Baselines under International Law of the Sea recommended the creation of another Committee specifically tasked with the consideration of the wide range of issues arising from the impacts of sea-level rise described above. The acknowledgement of both the existence of specific concerns arising out of the impacts of sea-level rise, and the suitability of establishing another Committee for the specific purpose of addressing them, were endorsed by the ILA Conference in Resolution n°1/2012. The establishment of the ILA Committee on International Law and Sea Level Rise was finally approved by the ILA Executive Committee in November 2012. Official website of the Committee available at: <<http://www.ila-hq.org/en/committees/index.cfm/cid/1043>>.

of climate change viewed through the prism of the earlier 'international law of coexistence', or even, in this case, of mere 'existence'.²⁵ All in all, the security approach to climate change not only contributes to the formation of a holistic view of the evolving forms that international co-operation on climate change is acquiring in the light of the new factual and political realities, it also invites rediscovery, or perhaps even redefinition, of what the central institution of the international legal system –the State – is.

2. Normative Discoveries and Methodological Choices

This thesis takes a normative stand which results from a series of three discoveries driven by the object of study itself – the discovery of contextuality, the discovery of relativity and the discovery of otherness. Each of these discoveries correlatively prompted the adoption of three defining methodological choices: the preference of political discourse over science as the founding stone of the legal analysis; the choice of approaching such a legal issue through a case study rather than abstract thinking; and the acknowledgement – imposed by the nature of the object of study itself – of the need for interdisciplinary incursions to be allowed and even preferred over a strict legal formalist approach.

The discovery of contextuality stems from the reconstructive task of the Climate Change and International Security Discourse undertaken in Part I of the thesis. Fundamentally, it implies that the question of the continuation or extinction of Pacific Island States threatened by climate change impacts stems from the interpretation that States have made of the phenomenon and the consequent construction of their interest in this matter. Rather than using scientific knowledge of climate change as the unique source legitimizing the approach to the legal question of the thesis, namely, the continuation of small islands' statehood, this thesis extracts such legal question from the study of the evolution, in *international life*, of the understanding of the phenomenon. This is consistent with my personal conception of law I as a social product that varies together with social evolution to respond to the new needs and challenges of the realm in which it is called upon to operate. This choice seemed all the more necessary that, while climate change as a phenomenon needs natural scientific knowledge to provide an explanation, the State is, in contrast, a fundamentally political construct (with sovereignty as its correlative and distinctive legal attribute). In addition, since the creation of States operates in the political realm, the same can be presumed for the question of extinction

²⁵ See P. M. DUPUY, 'International Law Torn between Coexistence, Cooperation and Globalization: General Conclusions, (1998) *European Journal of International Law*, vol. 9, pp. 278-286.

of States; and thus, taking into account the view that the international community already has on the matter (through the reconstruction of the Climate Change and International Security Discourse), may prove to be a determinant element of its resolution. To be sure, the choice of political discourse over science as the benchmark from which legitimizing the study on the effects of climate change on Pacific islands' statehood steps apart from the vast majority of studies generally dealing with climate change impacts. Yet, rather than perceiving political and scientific approximations to the legal issue at stake as mutually exclusive, I view them as potentially complementary.

Closely related to the discovery of contextuality and the choice of discourse over science, lies the discovery of 'relativity'. 'Relativity' in this context is simply understood as a synonym for 'non-dogmatic', and essentially implies that the results of this thesis are defended with conviction while acknowledging that objective knowledge is unattainable in the realm of social sciences and that the social institutions – including juridical institutions – under study exist in a changing context. Indeed, paradigm shifts at each historical moment in turn affect our view of international law. Andreas Paulus thus acknowledged the need *'to open up "legal science" for debate and contestation, without neglect to the constraints of the rules and principles agreed to by the international society may be the challenge of this method. Thus, a certain "middle-of-the-road" approach steering a course between normativity and contextuality seems unavoidable, even at the price of indeterminacy [...] International lawyers should both use the potentiality and accept the limits of their task.'*²⁶ The acceptance of this view has nurtured the tendency of the thesis to approach some issues from a genealogical perspective (for instance, to analyse the evolving role of territory in international law, in Chapter 4). It also explains the clear preference for interdisciplinary tools; as the area covered by this thesis is set on the boundary between international law and international life constantly oscillating from one realm to the other, legal formalism was clearly unsuited to address this theme.

Finally, the discovery of 'otherness' emerged when the reconstruction of the Climate Change and International Security Discourse revealed that Pacific Island States, as vulnerable and weak players in international affairs as they might be, are, nevertheless, not voiceless. Their claims were thus what led to the choice of a bottom-up approach based on the case study of Pacific Island States over the commonly used top-down abstract thinking. First, as Jane McAdam has consistently remarked, for international, regional and national responses

²⁶ See A. PAULUS, 'International Law after Postmodernism: Towards Renewal or Decline of International Law?', (2001) *Leiden Journal of International Law*, vol. 14, pp. 727-755, at 755.

proposed to be effective, they must be informed by a bottom-up approach that takes into account the desires, needs and concerns of the affected States and populations.²⁷ And yet, in this thesis, the bottom-up and case-study approach has not only been chosen for practical constraints, but relies on a complementary and a more deeply rooted normative view on both the contextual characteristics of the States concerned (historical and present), and the position from which I am invited to engage with them, through research and writing, and in spite of being a complete alien to the cultural reality and identity of the region. The discovery of 'otherness' stems, firstly, from the realization that Pacific Island States threatened by climate change impacts lie very much on the edge of both the family of States and the rationalist secular conception of State sovereignty predominant in western thought in which I am embedded. It then turns into what Anne Orford describes as the anxiety and sense of responsibility coming from the understanding, in Jacques Derrida's words, that *'to take decision in the name of the other in no way at all lightens my responsibility, on the contrary, my responsibility is accused by the fact that it is the other in the name of which I decide'*.²⁸ The reconstructive move of the Climate Change and International Security Discourse in Part I and the case study and bottom-up approach informing Part II are thus the methodological vehicle through which this thesis has sought to fulfil this sense of 'accused responsibility'. To be sure, this endeavour is still limited by the fact that the reconstruction of the Discourse and the interpretation of most data are necessarily conditioned by my own subjectivity; that, as Liliana Obregón put it, *'there is no identity, there is only identification and self-identification of a process'*.²⁹ Yet, the open acknowledgement of this limit seemed a much more acceptable burden to endorse than pursuing the alternative trend in which the voices of the States concerned, while filling regional and international fora, remained largely ignored and silenced in academic literature.

²⁷ See J. McADAM, *Climate Change, Forced Migration and International Law*, *supra*, at 5. McAdam has consistently maintained and defended this position all along in her work on climate-induced displacement. Her defense of a bottom-up approach to this matter has also been accompanied by a preference for a multidisciplinary approach enabling the scholar to better grasp the real desires, needs and concerns of the population affected. This was particularly noticeable in the joint publication J. McADAM (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, 2012, (Oxford, Portland Ore.: Hart Publishing).

²⁸ See A. ORFORD (ed.), *International Law and its Others*, 2006, (Cambridge, New York: Cambridge University Press), at 22.

²⁹ *Ibid.*, at 52.

3. Structure of the Thesis

The incursion into some of the unexplored territories of international law or the *terra incognitae* of the peripheries, on which this thesis embarks, is dealt with in two main Parts each comprising three chapters. This tripartite structure is then reproduced within each Chapter, which is divided into three main Sections, and with its respective introduction and conclusion. Sustaining such a tripartite structure throughout the thesis served to respond to the necessity of providing a wide encompassing theme with clear bearings; it was thus an actively sought structure, intended to: establish a clear-cut framework of reference for a theme that has not yet been dealt with comprehensively; maintain the overall balance of the thesis; and convey the sense of continuation between Parts I and II and of the interrelatedness among the chapters within each Part.

PART I is fully dedicated to the reconstruction of the Climate Change and International Security Discourse which has been introduced into the agendas of regional and global international organizations. It is thus highly focused on the realm of international politics. Chapter 1 begins by showing how the Climate Change and International Security Discourse can be conceived as a 'revival' of a political process started in the 1980s by the Soviet Union, which sought to link the spheres of 'environment' and 'security' as an alternative strategy to the arms race, and introduced the concepts of 'international ecological security' into the agenda of the United Nations. It then considers how the concept of environmental security, which evolved after the end of the Cold War outside the United Nations framework, developed in the 'security studies' doctrinal circles.³⁰ Important theoretical and empirical studies emerged in the 1990s (including opposing voices), reinforcing the link between environment and security and providing a basis for the Climate Change and International Security Discourse which was yet to come. Chapter 2 thus marks the point of departure of the 'second wave' of the environment and security link within the specific context of climate change. It maps the birth, circulation and limits of the Climate Change and International Security Discourse within and among

³⁰ It is worth noting that some international legal scholars took account of the emergence of the concept in its double-faced dimension. See, most prominently, J. BRUNÉE, 'Environmental Security in the Twenty-First Century: New Development of International Environmental Law', (1995) *Fordham International Law Journal*, vol. 18, pp. 1742-1747, who explains at 1742: 'Arguably, such a broader conception is inherent in the notion of "environmental security", a term that has been gaining currency. The term should be understood to have two dimensions. On the one hand, in placing emphasis upon the environmental dimension, security means maintaining an ecological balance, at least to the extent necessary to sustain resource supplies and life-support systems. On the other hand, in emphasizing the dimension of security in the traditional sense, the term refers to the prevention and management of conflicts precipitated by environmental decline'.

regional organizations, showing how it emerged from hegemonic regions (the Euro-Atlantic Axis) and was then disseminated to the regional organizations of the most vulnerable regions – notably the Pacific Islands Forum and the African Union – while remaining unabsorbed by emerging regions less likely to suffer extreme climate change impacts and opposing the movement and the fight to maintain the climate change global discourse within the mainstream UNFCCC–KP framework. Chapter 3 moves on from the regional level of analysis to the universal level, reconstructing the introduction of the Climate Change and International Security Discourse into the policy agenda, and the operation, of the two core organs of the United Nations: the Security Council (UNSC) and the General Assembly (UNGA). The focus is thus placed both on the origins of the three different moments, in which these UN organs were called upon to discuss climate change from a security perspective (UNSC-2007, UNGA-2009 and UNSC-2011) and the content of the positions on this approach of the UN Member States who participated in them. Most importantly, Chapter 3 shows that the latest understanding of the Climate Change and International Security Discourse, as widely approved by a majority of States, can be reduced to one fundamental issue: the threat of climate change to the survival of low-lying island States.

PART II thus operates a shift from the political or ‘pre-normative’ level of analysis to the formulation of a legal question, namely, how do climate change impacts jeopardize the continuation of Pacific islands’ statehood. To do so, it analyses how the elements of statehood are challenged by climate change effects through the study of Pacific Island States, which are the major co-promoters of the Climate Change and International Security Discourse, and this in a region where three out of the four low-lying island States – all with a maximum altitude of less than 5 metres – are located (Kiribati, Tuvalu and the Marshall Islands). The analysis of the effects of climate change on Pacific Island States is thus carried out through a division of three main dimensions of statehood. Chapter 4 deals with the effects of climate change on Pacific islands’ territory – referred to as the ‘de-territorialization challenge’ – including how climate change may affect the maritime entitlements of these often called ‘Ocean States’. It also introduces the question of whether completely de-territorialized nations may still survive as independent sovereign entities, through the analysis of two precedents: the Holy See and the Order of Malta. Chapter 5 considers the implications of climate change impacts on Pacific islanders themselves. After a comparative analysis of the climate-induced relocations already accomplished in the region, it focuses on the controversial legal status of ‘climate-induced displaced people, often called ‘climate refugees’, and proposes an alternative approach to the legal-protection tools which have so far been developed. Finally, Chapter 6 is devoted to a

study of the effects of climate change on Pacific islands' governmental capacities, both nationally and internationally. Taking stock of the literature on 'failed States' and governments in exile, it first deals with the scenario in which governments of Pacific Island States may be obliged to evacuate State territory (referred to as '*ex situ* governments'). Ultimately, as the three dimensions of Pacific islands' statehood may be challenged at any time, this Chapter explores the role to be played by different normative and political avenues which will determine their continuation as States, including, most notably, their own claims to statehood, the corresponding international recognition and, ultimately, the outcome of Pacific islanders' exercise of their right to self-determination.

PART I
**THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE:
A RECONSTRUCTION**

CHAPTER 1

**THE RISE AND FALL OF THE 'INTERNATIONAL ENVIRONMENTAL SECURITY' CONCEPT:
A PRECEDENT TO THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE
(1985-2005)**

1. INTRODUCTION

2. THE BIRTH OF 'INTERNATIONAL ECOLOGICAL SECURITY': A PRODUCT OF SOVIET 'NEW THINKING' (PERESTROIKA)

2.1. Perestroika and International Law in Context

2.1.1. Soviet 'Traditional' Thinking and International Law: From the 1917 Russian Revolution to Détente

2.1.2. Soviet 'New Thinking' and International Law: The Change of Paradigm

2.2. The 'Green Dimensions' of Perestroika

2.2.1. 'Ecological Security': Launch of the New Soviet Environmental Protection Strategy

2.2.2. 'International Ecological Security': Combined Product of National Environmentalism and the Reification of International Law

3. 'INTERNATIONAL ENVIRONMENTAL SECURITY' IN THE LATE PHASE OF THE COLD WAR: INCLUSION IN THE AGENDA OF THE UNITED NATIONS (1985-1991)

3.1. The Positive Dimension: 'International Environmental Security' as International Environmental Co-operation (Phase One: 1985-1987)

3.1.1. A Controversial Framework: Gorbachev's Project for a 'Comprehensive System of International Peace and Security'

3.1.2. An Innovative Component: The Draft Proposal on 'International Ecological Security' at the Second Committee of the General Assembly on Economic and Financial Matters

3.2. The Negative Dimension: 'International Environmental Security' as International Disarmament Co-operation (Phase Two: 1988-1991)

3.2.1. Shifting Locations: Rise of the Soviet 'Comprehensive Approach to International Peace and Security' at the First Committee of the General Assembly on Security and Disarmament

3.2.2. Limited Timing: Break-up of the USSR and the Legacy of the 'Comprehensive Approach to International Peace and Security' Project

4. ENVIRONMENTAL APPROACHES TO SECURITY AT THE INCEPTION OF THE NEW WORLD ORDER: FURTHER DEVELOPMENTS OUTSIDE THE UNITED NATIONS SYSTEM (1991-2005)

4.1. Changing Theoretical Conceptualizations: Environmental Component of Security in International Security Studies

4.1.1. Constructivism and the Copenhagen School: The 'Securitization' of the Environment

4.1.2. Critical Thinking of Security: Redefining Sovereignty in the Ecological Era

4.2. Innovative Empirical Research: The Quest for the Environmental Causes of Conflict

4.2.1. Spread of Empirical Studies: A Euro-Atlantic Movement

4.2.2. Opposing Voices: Ontological and Epistemological Critiques

5. CONCLUSIONS

*'Could the time be coming when as much lasting security
can be purchased through trees as through tanks?'*

Michael Myers, 1995.

1. INTRODUCTION

Dealing with the notion of security appears as the necessary and inescapable point of departure of any attempt to study the Climate Change and International Security Discourse and its 'international environmental security' precedent.

The birth of the notion of security can be traced back to the aftermath of the First World War; it constituted the crystallization of the intellectual and political participation by civilians in war and defence issues in the Western world. As reported by E. H. Carr, the psychological effects of the First World War generated a widespread 'popular demand' for integrating the conduct of international relations – especially the decision to go to war – into the realm of national politics.³¹ As the heart of the decision power over foreign-policy issues shifted from the military to political parties, public scrutiny was ensured.³² The first uses of the concept of security are thus the result of a sociological process initiated in Anglo-American intellectual circles of the 20th century inter-war period and were closely intertwined with the parallel birth of international politics as a science.³³ Then, the traditional configuration of the notion of security was consolidated in American literature by the Realism, the international relations movement that developed in the aftermath of World War II. Realism gave to the notion of security a solidly grounded theoretical and institutional habitat. Fitting perfectly the Realist explanation of the conduct of international relations – governed by the power factor-³⁴ it became the central notion of newly established schools of international security studies.³⁵ Yet,

³¹ E. H. CARR, *The Twenty Years' Crisis: 1919-1939 An Introduction to the Study of International Relations*, 1946, (London: MacMillan Press Ltd.), Part I, Chapter 1, at 4.

³² Carr contends that the sacred trust in both the power and the rightness of public opinion professed by the American political class of the inter-war period is a mark of the influence of the eighteenth century English rationalism of Jeremy Bentham. *Ibid.*

³³ International politics was the previous name given to political science or to international relations which was used up to World War II. *Ibid.*

³⁴ H. MORGENTHAU, K. THOMSON, D. CLINTON, *Politics among Nations: The Struggle for Power and Peace*, 1948, (New York: McGraw Hill), at 50. Morgenthau defines political power as 'the mutual relations of control among the holders of public authority and between the latter and the people at large'. Similarly, G. KENNAN condemned the moralistic-legalistic approach to international problems of the Wilsonian model in *American Diplomacy 1900-1950*, 1951, (Chicago: University of Chicago Press).

³⁵ Two seminal articles inaugurated the golden age of the notion of security: J. HERZ, 'Idealist Internationalism and the Security Dilemma', (1950) *World Politics*, vol. 2, issue 2, pp. 157-180, at 157;

soon after such a habitat was found, the bipolarization of the world between the eastern-Soviet and the Western-American blocs and the threatening shadow of the nuclear weapon eclipsed any further theoretical developments of the concept.³⁶

Nonetheless, after three decades of conceptual encapsulation in the Realist (also referred thereafter as 'traditional') understanding of security, events in the international sphere called for a revision of the material scope of security so as to include non-military issues. Firstly, the 1973 Oil Crisis recalled the inextricable connection between a State's level of military war-making capacity and its secured access to natural resources.³⁷ This promoted a scholarly debate in American and western European intellectual circles, whereby environmental considerations were for the first time approached from a security standpoint and the first formulations of the term 'environmental security' were raised. The notion of security was accordingly reshaped and redefined – though only in so far as it had a direct impact on the military capacities of the western bloc.³⁸ The second event concerned the

and A. WOLFERS, "National Security" as an Ambiguous Symbol', (1952) *Political Science Quarterly*, vol. 67, issue 4, pp. 481-502. Herz formulated the 'security dilemma', requiring the existence of both an anarchical society and members with competing interests – materialized by their individual quest for absolute or relative power. Two years later, Wolfers' article defined security as an 'ambiguous symbol'³⁵ which '[I]n an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked'. WOLFERS, *supra*, at 485. An analytical and historical institutional genealogy of 'International Security Studies' can be found in B. BUZAN and L. LARSEN, *The Evolution of International Security Studies*, 2009, (Cambridge, UK: Cambridge University Press).

³⁶ The freezing of the conceptual analysis of the notion of security explains why it was absorbed by the 'practical' and concrete adjacent notion of 'strategy', defined by Charles-Philippe David as *'the planning and the conduct of military operations'*, in C.-P. DAVID, *La Guerra y la Paz: Enfoque Contemporáneo sobre la Seguridad y la Estrategia*, 2008, (Barcelona: Icaria Antrazyt), at 61. It also results from the natural inclination of Realists to privilege practice of and approach to politics fundamentally from an empirical perspective. See CARR, *supra*, at 13-18.

³⁷ The 1973 Oil Crisis put into the scenario of international politics the fear of 'resource wars'. See for instance J. NYE, 'Collective economic security', (1974) *International Affairs*, vol. 50, issue 4, pp. 584-598. *Contra*, L. BROCK, 'Security through Defending the Environment: an Illusion?', in E. BOULDING (ed.), *New Agendas for Peace Research: Conflict and Security Reexamined*, 1992, (Boulder, Colo.: Lynne Rienner Publishers), at 108, who considers that *'scarcity as such does not exist, it only exists in specific political, socioeconomic and cultural contexts'*; R. LIPSCHUTZ and J. HOLDREN, 'Crossing Borders: Resources Flow, the Global Environment, and International Security', (1990) *Bulletin of Peace Proposals*, vol. 21, pp. 121-133, who in turn consider that the need for specific resources more often serves as a rationalization of military state behaviour that is actually the cause of war; see finally H. E. GOELLER and A. WEINBERG, 'The Age of Substitutability', (1978) *American Economic Review*, vol. 68, issue 6, pp. 1-11, whose theory contends that the possibility to recreate earth materials artificially through technological development reduces geostrategic dependence on natural resources.

³⁸ See J. TUCHMANN MATHEWS, 'Redefining security', (spring 1989) *Foreign Affairs*, vol. 68, issue 2, pp. 162-177. Since interdependence is a condition shared not only for financial flows, but also for environmental factors, Tuchmann Mathews, a leading proponent of an expansion of the scope of security, explains that: *'Environmental strains that transcend national borders are already beginning to break down the sacred boundaries of national sovereignty, previously rendered porous by the*

eastern bloc, for which internal transformation in the mid-1980s stemming from Mikhail Gorbachev's new political blueprint – *perestroika* – the restructuring of the Soviet political and economic system, which will be referred to hereafter as 'Soviet New Thinking', proved to be capital for the integration of the notion of 'international environmental security' into the debate within the United Nations system. Although the Soviet attempt was curtailed by the break-up of the eastern bloc, it set the basis of what can today be understood as a precedent: the application of the environmental approach to security within the United Nations system.

This chapter argues that the Climate Change and International Security Discourse developed in the late 1990s can be conceived as the 'second wave' of environmental approaches to security. Its 'international environmental security' precedent can be said to be based on two pillars: the approach initiated *before* the ending of the Cold War and promoted within the United Nations system by the eastern bloc, on the one hand; and the theoretical and empirical studies that developed in western doctrine *after* the ending of the Cold War, on the other. The principal aim of this chapter is therefore to place these 'pioneering accounts' in the historical political framework in which they were launched.

Thus, Section 2 begins with an elucidation of how the notion of 'international ecological security' emerged within the Soviet Union as a combined product of the development of national environmentalism, on the one hand, and a reification of the role of international law for the development of international co-operation, on the other. Section 3 focuses on the introduction of the environment and security link into the agenda of the United Nations, as pushed for by the Soviet Union and supported by most of its closely allied communist States. This attempt reached its most prominent manifestation in 1987 with the draft proposal of a General Assembly resolution on 'International Ecological Security', which was presented as one aspect of a much more far-reaching and controversial proposal from the Soviet Union calling for the institution of a 'Comprehensive System of International Peace and Security'. Finally, in Section 4, how the concept of environmental security pushed for by the Soviet Union evolved after the end of the Cold War as a result of the transformation of the historical and political context is considered. Although it did not find further development within United Nations institutions after 1991, the notion of 'environmental security' remained very much alive in western doctrinal circles of some disciplines, in particular in the field of security studies. Important theoretical and empirical studies emerged in the 1990s (including opposing voices), which reinforced the link between environment and security in social science

information and communication revolutions and the instantaneous global movement of financial capital', at 162.

and provided a wider basis for the Climate Change and International Security Discourse that was yet to emerge.

2. THE BIRTH OF 'INTERNATIONAL ECOLOGICAL SECURITY': A PRODUCT OF SOVIET 'NEW THINKING' (*PERESTROIKA*)

The notion of 'international environmental security' (also referred to as 'international ecological security') emerged from the Soviet bloc in the mid-1980s, as a result of the double-edged effects – national and international – of the 'new thinking' enacted by President Gorbachev. In order to identify the founding rationale of the concept and determine its role within the new political design, first, the meaning and effects of *perestroika* on the Soviet approach to international law are put in context; then the environmental dimension of this new thinking is considered. Both elements lead to the formulation of the notion that would be circulated to the United Nations system.

2.1. Perestroika and International Law in Context

2.1.1. Soviet 'Traditional' Thinking and International Law: From the 1917 Russian Revolution to *Détente*

The evolution of Soviet thinking with respect to international law can be divided into three main stages, each corresponding to a change of direction in the conduct of Soviet foreign affairs (political decision), followed or accompanied by a new understanding of the nature and formation of international rules as well as their adequacy to the tenets of Marxist-Leninist socialism (theoretical formulation).³⁹

The first stage, beginning by the end of World War I, was marked by the denunciation of international law as a form of 'bourgeois' law pre-existing the birth of the Soviet State. As it had not participated in the law-making process, the Soviet State did not consider itself bound by international law. This political position was materialized through Lenin's decision to refuse the payment of the debts contracted by the Tsarist Russian Empire during the Napoleonic

³⁹ For a thorough explanation of the different phases of the Soviet thinking with respect to international law, until the establishment of the doctrine of peaceful coexistence, see J. QUIGLEY, 'The New Soviet Approach to International Law', (1965-1966) *Harvard International Law Club Journal*, vol. 7, issue 1, pp. 1-32. Jean-Christophe Romer explained how the evolution of the Soviet military thinking and doctrines between 1945 and 1985 were essentially marked by the dominant Marxist-Leninist social ideological '*présupposés*', for the relationship between the Army and the Party were extremely close. J.-C. ROMER, 'Evolution de la Pensée Militaire Soviétique (1945-1985)', (1986) *Relations Internationales*, vol. 5, pp. 51-66.

Wars.⁴⁰ Philosophically, it was fully consistent with the Marxist view of law as a 'superstructure' serving the perpetuation of capitalist States, whereas, from a legal perspective, it translated the refusal of the Soviet State to consider itself as the successor of the Tsarist Russian Empire. Yet, as the ideological rejection of international law impeded the full realization of Soviet foreign-policy goals – particularly those concerned with international trade⁴¹ – some degree of involvement with the existing legal system was needed, such as accepting the conclusion of bilateral commercial treaties. The inter-war period therefore saw the first important doctrinal attempt to reconcile these two opposing forces. Led by E. Korovin, E. Pashukanis and, later on, followed by A. Vyshinskii,⁴² international law was depicted as a transitional compromise across classes that would last until the spread of the socialist revolution throughout the world had been achieved. Since the eastern and western blocs could not be ideologically reconciled, these authors conceived the existence of two normative orders coexisting at the international level. Each order would constitute a superstructure built up on opposed ideological foundations: one Marxist-Leninist/socialist and one Liberal-bourgeois/capitalist. Henceforth, the rules of international law accepted by the Soviet State were those emerging from the concurrence of *similar* norms existing in *both* superstructures.⁴³ This first approach to international law remained predominant until after World War II and the beginning of the Cold War.

The second stage began with an important scholarly debate which seemingly took place from 1952 to 1956. It was launched by G. Tunkin's publication of an article in which he objected to Korovin's transitional inter-class compromise constituted by two international legal superstructures.⁴⁴ In contrast, Tunkin's view held that the existence of two ideological

⁴⁰ J. HAZARD, Lecture: 'New Thinking' in Soviet Approaches to International Politics and Law' (1990) *Pace Yearbook of International Law*, vol. 1, pp.1-20, at 5: '[W]hy should a government emerging from a revolutionary change be required to support the international law norm on payment of debts by a successor government? He (Lenin) believed that a social revolution broke the chain. To Lenin, power passing from one group of a class to another group within the same class was not a coup'.

⁴¹ Commercial activity was capital for the achievement of Soviet economic prosperity and the correlative success of its communist project.

⁴² E.A. KOROVIN, *International Law of the Transition Period [Meždunarodnye dogovory i akty novogo vremeni]*, 1924, (Moscow: Gosudarstvennoe izdatel'stvo); E.A. KOROVIN, *Contemporary International Public Law [Sovremennoe meždunarodnoe publičnoe pravo]*, 1926, (Moscow: Gosudarstvennoe izdatel'stvo); E.B. PASHUKANIS, *Outlines for International Law [Očerki po mezhdunarodnomu pravu]*, 1935, (Moscow: Gosudarstvennoe izdatel'stvo), at 18; A. VISHINSKYI, *The Law of the Soviet State*, 1939, (Moscow: Sovetskaja Justicija).

⁴³ Note that the concurrence would only arise out of 'similar' norms, given that ideologically insurmountable differences made it theoretically impossible to produce 'identical' rules.

⁴⁴ For a detailed account of the exchange of articles and letters during that period, and the impact it had on both the Soviet approach to international law and on the international law's scholarly circles, see J.QUIGLEY, 'The New Soviet Approach to International Law', (1965-1966) *Harvard International Law Club*

blocs did not imply that a superstructure would emerge out of each of them, and argued that international law was one single superstructure within which international legal rules resulted from the formulation of agreements between States belonging to opposing blocs. Therefore, he claimed the unity of the international legal system, as well as the non-transitional nature of the agreements.⁴⁵ As J. Quigley points out, this new approach '*showed the formation of international law as the result of a give-and-take process in which both camps participated*'.⁴⁶

Tunkin's theory of agreements provided the platform for the third stage of Soviet thinking on international law on which a new Soviet foreign policy based on the doctrine of peaceful coexistence could be elaborated,⁴⁷ and marked the first gradual evolution in the perception that international law was also a Soviet phenomenon. In 1952, he gave the legal grounds for what became the political enunciation of the first stage of the Cold War, since, four years later, the 20th Congress of the Communist Party officially adopted the Yugoslav proposal of 'peaceful coexistence' as the new foreign policy of the Soviet Union.⁴⁸ In doing so, an official willingness to depart from the class-conflict analysis of international law was established. However, notwithstanding the shift towards a vision of international law as forming a single superstructure, Tunkin conceived a way of maintaining the 'differential nature' of the law emanating from the two ideological blocs. The original idea that different rules emanated from the two blocs was thus reconciled with the assumption that the international legal order was one single superstructure, through the notion of 'concentric circles'. The wider legal circle consisted of general international law, containing rules and norms of co-operation applicable among States of the two opposing blocs. However, the

Journal, vol. 7, issue 1, pp. 1-32; J. HAZARD, 'Cleansing Soviet International Law of Anti-Marxist Theories', (1938) *American Journal of International Law*, vol. 32, pp. 244-252; and W. E. BUTLER, 'Socialist International Law or Socialist Principles of International Relations', (1971) *American Journal of International Law*, vol. 65, pp. 796-800.

⁴⁵ Tunkin's theory of agreements was thus fundamental to the construction of the theory of peaceful coexistence. See W. E. BUTLER, *Perestroika and International Law*, 1991, (Leiden and Boston: Brill), introduction, at 3.

⁴⁶ QUIGLEY, *supra*, at 12.

⁴⁷ See S. KRYLOV, 'Les notions principales du droit des gens (la doctrine soviétique du droit international)', (1947) *Recueil de cours de l'Académie de la Haye*, vol. 70, issue 1, pp. 407-476; and then G. TUNKIN, 'Coexistence and International Law', (1958) *Recueil de cours de l'Académie de la Haye*, vol. 95, issue 1, pp. 1-82. As a result of the political materialization of his influential legal theory, Tunkin was appointed Chief of the Soviet Legal Division of the Ministry of Foreign Affairs. For a western account of the time, see for instance E. McWHINNEY, 'Peaceful Co-existence and Soviet-Western International Law', (1962) *American Journal of International Law*, vol. 56, pp. 951-970.

⁴⁸ Later on, some voices, such as Serge Krylov – first Soviet Judge at the International Court of Justice – claimed that the original idea of peaceful coexistence came from Lenin, not from the Yugoslav proposal, in K. GRYBOWSKY, 'Soviet Theory of International Law for the Seventies', (1983) *American Journal of International Law*, vol. 77, pp. 862-872.

existence of general international law would not rule out the possibility of developing specific (regional and local) rules and norms based on the principle of socialist internationalism and exclusively applicable among States of the Soviet bloc. Within this narrower circle, the validity of rules and norms of socialist internationalism depended only on their consistency with general international law.⁴⁹ Moreover, Tunkin's theory of agreements offered the political flexibility that the Soviet State needed to maintain a certain internal degree of ideological coherence (i.e. leaving it free to choose certain international rules while rejecting others), while ensuring its presence and participation as a major actor in the international arena beyond commercial and trade areas. As a result of the doctrinal shift proposed by Tunkin and the entry into a new phase of recognition of the unity of the international legal system, the Soviet State made extensive use of treaty law, which it enthroned as the primary source of international law.⁵⁰ This marked the shift from bilateralism to the conclusion of multilateral treaties, particularly activated by the support of codification of international law that took place between the 1960s and the 1980s. Since the active participation of the Soviet Union in the formation of international law, the initial rejection of it, for being exclusively 'bourgeois law', was successfully overcome by the view that international law was partly bourgeois and partly socialist.⁵¹

⁴⁹ The relationship of the concentric circles and their origins is explained in C. OSAKWE, 'Socialist International Law Revisited', (1972) *American Journal of International Law*, volume 66, issue 3. In response to J. HAZARD, 'Renewed Emphasis upon a Socialist International Law', (1971) *American Journal of International Law*, vol. 65, issue 1, pp. 142-148. For an explanation on how the role of Socialist internationalism evolved from being the basis of the international workers' movements (proletarian internationalism) to regulate relations between the Soviet Commonwealth of Nations of an interstate nature, see OSAKWE (citing G. Tunkin), *supra*, at 598. See also, S. SCHWEBEL, 'The Brezhnev Doctrine Repealed and Peaceful Coexistence Enacted', (1972) *American Journal of International Law*, vol. 66, issue 5, p. 817: 'In earlier days of Khrushchev's preaching of peaceful coexistence, the Soviet Union had made it plain that the mere peaceful co-existence did not suffice for relations among the socialist group, which were governed by the principles of "socialist internationalism".'

⁵⁰ As explained by Quigley, 'the Soviets could hardly be expected to find this to their liking, since all customary norms had been formulated by hostile bourgeois States.' It was thus natural that 'they consider the treaty as the principal means of creation of legal norms between the Soviet Union and the West'. Henceforth, Soviet international legal scholars quickly declared that the treaty constituted 'the principal source of international law' and that international custom was relegated, for the Soviets, 'to the role of subsidiary source of norm-creation'. In QUIGLEY (based on KOROVIN's 1924 treatise), *supra*, at 12.

⁵¹ John Quigley also highlights the political utility of Tunkin's theory within Soviet spheres of influence, since the conception of international law as one single unit, which resulted from an agreement among States of the two opposing blocs, made it feasible to 'demonstrate how the Soviet Union had convinced bourgeois States to recognize certain (socialist) norms as part of the single superstructure of international law', in QUIGLEY, *supra*, p. 12. As explained by Quigley, D. B. Levin's words – coming from one of the most prolific writers on Soviet international legal expertise – epitomize well the change of perspective when he explains that: 'the Soviet Union accepts all those bourgeois norms and institutions

2.1.2. Soviet 'New Thinking' and International Law: The Change of Paradigm

The Soviet thinking with respect to international law based on Tunkin's theory of agreements and the principle of peaceful coexistence remained in the mainstream from 1956 to 1962, and even after entering the period of *détente* which followed the 1962 Cuban Missile Crisis. Then, the 1973 Oil Crisis forced the Soviet Union to abandon its position of economic isolation, and important changes in the Soviet study of western writings in international law ensued.⁵² That year, oil prices quadrupled.⁵³ As one of the more important oil producers of the time, the crisis initially had positive effects on the USSR and brought about an extraordinary boost in the Soviet economy between 1970 and 1980.⁵⁴ Yet, such an unexpected period of bonanza also had ambiguous effects, as it seemingly motivated Brezhnev's decision to engage in an arms race and compete against the USA's superior war-making capacity at the time.⁵⁵ As a result of this change in foreign policy, the Soviet military establishment acquired a 'superpower status' which, by the mid-1980s, would clearly appear economically unsustainable.

Yet, before the long-term non-viability of Brezhnev's foreign policy became evident, the relationship between the two blocs had evolved from isolation to acknowledged economic interdependence. The understanding of the new world reality was soon embodied in politico-legal terms, first by the celebration in 1973 of the first Conference on Security and Cooperation in Europe (CSCE), the launch that same year of the so-called 'Helsinki Process', and the resulting adoption in 1975 of the Helsinki Final Act.⁵⁶ This agreement involved States from both blocs and was characterized by the newly coined notion of 'comprehensive security', a cornerstone formula which gave theoretical coherence to the institutional and

which serve the cause of peace, defend the independence of peoples, and serve international cooperation'. Ibid., at 9.

⁵² GRZYBOWSKI, *supra*, at 862.

⁵³ E. HOBBSBAWM, *The Age of Extremes: The Short Twentieth Century*, 1994 (London: M. Joseph), Chapter entitled 'The End of Socialism', at 475. As Hobsbawm points out, from 1970 to 1980, Soviet exports to developed market economies increased 19%, and 32% for total exports.

⁵⁴ *Ibid.*, at 475: 'The millions simply rolled in without effort, postponing the need for economic reform and, incidentally, enabling the USSR to pay for its rapidly growing imports from the West with exported energy'.

⁵⁵ *Ibid.*, at 474. Hobsbawm carefully avoids affirming that there is a proven link between the economic bonanza of the time and Brezhnev's decision to embark upon a more aggressive international policy. He reports instead that this idea 'has been suggested' by some historians such as Maksimenko.

⁵⁶ Conference on Security and Cooperation in Europe, Final Act, adopted at Helsinki, on 1 August 1975 by the High Representatives of the Participating States. The adoption of this instrument (generally referred to as the 'Helsinki Final Act') put an end to a process (generally referred to as the 'Helsinki process') which began on 3 July 1973 in Helsinki and was pursued in Geneva from 18 September 1973 to 21 July 1975.

normative framework newly set up. Security in Europe would be ensured through co-operation between the two blocs in three main areas, generally referred to as 'the three baskets'. Basket 1 logically deals with co-operation in the politico-military field (important to ensure the maintenance of the established borders in Europe). More innovative, however, were the two other baskets: the acknowledged 'new dimensions of security' developed in the Helsinki Final Act, namely, co-operation in the economic and the *environmental* fields (Basket 2); and, likewise, in the arena of human security (Basket 3). Although the Helsinki Final Act was not given a legally binding effect (Rein Mullerson considers it as being '*politically and morally binding*'),⁵⁷ the notion of 'comprehensive security' that emerged epitomized the merger between the Soviet conception of general international law based on the principle of peaceful coexistence and the recently forged change in economic policy leading to an increased openness towards the western bloc in the field of economic and environmental co-operation.⁵⁸ In Section 3, such a notion will be 'rediscovered' with perestroika in the mid-1980s and become the conceptual tool through which the Soviet new thinking was channelled in United Nations institutions.⁵⁹

By the beginning of the 1980s, the golden period of the Soviet economy had been washed away and a new period of profound reform was about to be initiated⁶⁰. In 1985, exactly one decade after the adoption of the Helsinki Final Act, Mikhail Gorbachev came to power as Secretary-General of the Communist Party of the Soviet Union. A scent of change had already been felt since Yuri Andropov, Chief of Security Section and predecessor of Gorbachev, distanced himself from the Brezhnev regime in 1983. The full explanation of the foundational reform and the new governmental agenda would finally be explained in detail with the

⁵⁷ See R. MULLERSON, 'Sources of International Law: New Tendencies in Soviet Thinking', (1989) *American Journal of International Law*, vol. 83, pp. 494-512, at 509.

⁵⁸ For instance, on 15 August 1986, the Soviet State applied for permission to participate as observer at the eighth and last round of the trade negotiations conducted under the General Agreement on Tariffs and Trade (GATT), with, as Kevin Kennedy explains, '*full membership in GATT following in "due course"*'. See K. C. KENNEDY, 'Accession of the Soviet Union to GATT', (1987) *Journal of World Trade Law*, vol. 21, pp. 23-39.

⁵⁹ As Butler notes, the Central Committee considered that '*[t]he notion that systems move along parallel ways is an illusion*', for '*[t]he interdependence of the world is such that these parallels inevitably intersect, both systems and the countries therein interact closely within the framework of general world development, in scientific-technical, economic and social domains, in human relations, and in resolving global problems*', in W. E. BUTLER, 'International Law, Foreign Policy and the Gorbachev Style', (1989) *Columbia Journal of international Affairs*, vol. XXII, pp. 363-375, at 372.

⁶⁰ Afghanistan, being coupled with eastern Europe in the 1978 war, suffered from an acute energy crisis; political events such as the Soviet non-reaction (namely, non-military intervention) in Poland in 1981 following the movement led by the Polish trade union *Solidarnost* and supported by the Catholic Church, already gave the sense that eastern Europe was and would continue to be, as E. Hobsbawm explains, the political 'Achilles heel' of the USSR. HOBBSAWM, *supra*.

publication in 1987 of Gorbachev's book *Perestroika: New Thinking for Our Country and the World*. Perestroika (or 'new thinking') was marked, as A. Carty and G. Danilenko explain, by the purpose and '*desire to reshape international society into one interdependent unit*'.⁶¹ It constituted a foundational principle of Soviet political conduct (at both the national and international levels) and a major departure from the doctrine of peaceful coexistence which had remained steadily dominant for four decades since the end of the Second World War. The main task brought about by perestroika was a full-range reassessment of the place of the rule of law in the Soviet Union.⁶² Hence, acknowledgement of the primacy of common human values was put at the centre of this new foundational principle, the effects of which were materialized both in the national and international realms. The main internal effect was the launch of a movement of democratization in all areas and levels of decision-making (from reforms of the economic system to legislative developments on environmental protection). As a corollary of the increased level of public participation, transparency (*glasnost*) and access to information were also promoted.⁶³ At an international level,⁶⁴ the reassessment of the rule of law brought about a definite turn in Soviet foreign policy, the cardinal tenet of which was the establishment of the primacy of international law over State policy.⁶⁵ This tenet had not only practical consequences, such as the repayment of arrears to the United Nations and a host of proposals to enhance the role of international institutions, but also affected the Soviet approach to international law as such. Henceforth, V. Vereschetin and R. Mullerson – 'spokesmen' for the Soviet approach to international law in this period – called for the

⁶¹ These authors nonetheless remind us that that the doctrine of peaceful coexistence was not completely banned, as Soviet New Thinking '*did not abandon the belief in the inevitability of class struggle*'. A.CARTY and G. DANILENKO, *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, 1990, (Edinburgh: Edinburgh University Press), at 1.

⁶² Butler considers that the move towards the consideration of international law as part of the Soviet rule of law system can be traced back to the years 1977–1978 when international law received constitutional recognition as part of municipal law or the national rule of law system, in W. E. BUTLER, *International Law, Foreign Policy and the Gorbachev Style*, *supra*, at 365.

⁶³ See HOBBSBAWM, *supra*, at 480-482. *Glasnost* was in fact not only the corollary of democratization, but had a deeper 'autonomous' meaning as a way to break with the *nomenklatura* of the Brezhnev era.

⁶⁴ *Ibid.* See also W. E. BUTLER, 'International Law, Foreign Policy and the Gorbachev Style', *supra*, at 371-374; and W. BUTLER, *Perestroika and International Law*, *supra*, at 3; and A. CARTY, 'Changing Model of the International System', in *Perestroika and International Law: an Anglo-Soviet Debate*, p. 15.

⁶⁵ BUTLER, *Perestroika and International Law*, *supra*, Introduction, at 3. See also V. VERESCHETIN and R. MULLERSON, 'Primacy of International Law in World Politics', in W. BUTLER (ed.), *Perestroika and International Law*, *supra*, at 6: '*[i]t is not accidental, therefore, that along with common human values and interests, interdependence and integrity of the world, and a free choice of ways of development, the concept of primacy of international law in politics has been increasingly fixed in new political thinking.*'

development of international rules and principles '*free from ideology*'.⁶⁶ The principle of peaceful coexistence – previously perceived as a form of class struggle in the international arena – was, for instance, revisited and adapted by these authors, who presented it as a general principle of international law, '*universal in application and binding in the relations of States*' and imposing upon them a duty to co-operate.⁶⁷

2.2. The 'Green Dimensions' of Perestroika

2.2.1. 'Ecological Security': Launch of the New Soviet Environmental Protection Strategy

Originally, Marxism-Leninism did not pay specific attention to nor took into account environmental protection, but was exclusively concerned with the identification of the sources of class struggle in economic structures. Yet, as environmentalism spread in the western bloc (particularly in Europe) during the 1960s in association with pacifism,⁶⁸ so would it eventually attain Soviet society.⁶⁹

As W. E. Butler points out, Soviet environmental law has been subject to extensive modification since the 1950s, and has always figured as part of a wider programme.⁷⁰ It can be said that a first important evolution in Soviet environmental law took place in the 1970s, seemingly pushed forward by the recent trend to insert environmental issues into the international agenda, such as the celebration of the UN Conference on the Human Environment (Stockholm, 1972), and the most important USA–USSR Agreement for Cooperation in the Field of Environment adopted in the same year.⁷¹ Under the umbrella of this bilateral agreement, N. Robinson notes, an important flow of joint working projects in

⁶⁶ V. VERESCHETIN and R. MULLERSON, 'The New Thinking and International Law', (1988) *Soviet State and Law*, vol. 3, pp.3-5. The authors stated that '[t]he earlier formulation of peaceful coexistence as the class struggle in the international sphere [i]s a principle of interstate relations that should not be turned into an arena for class struggle'.

⁶⁷ *Ibid.*

⁶⁸ See J. RIECHMANN, 'Los verdes alemanes', 1994, (Madrid: Editorial Comares).

⁶⁹ See, for instance, A. GARE, *Postmodernism and the Environmental Crisis*, *supra*, Chapter 3 'Post-structuralism, Marxism and the Environment'.

⁷⁰ W.E. BUTLER, 'Law Reform in Soviet Environmental Law', (1988) *Pace Environmental Law Review*, vol. 5, issue 2, pp. 425-438, at 426.

⁷¹ As explained by Robinson, since the USA and the USSR (together with Canada) share common borders, they have also similar environmental protection interests, particularly in the Arctic. Both superpowers had thus acknowledged the need for international co-operation in this field ever since 1972. In this context, and following the release, one week earlier, of the report of the 10th meeting of the USA–USSR Joint Committee on Cooperation in the Field of Environmental Protection, Presidents Reagan and Gorbachev met in Geneva on 13 December 1988 and adopted the USA–USSR Agreement for Cooperation in the Field of the Environment. In ROBINSON, *supra*, at 353. For a more detail account of this agreement, see N. ROBINSON and G.WAXMONSKY, 'The USA–USSR Agreement to Protect the Environment: 15 Years of Cooperation', (1988) *Environmental Law*, vol. 18, pp. 403

various fields of environmental concern (air, water and marine pollution, protection of wildlife, climate analysis, etc.) was undertaken, forging a deep and long-lasting co-operation experience between the two superpowers.⁷² Mirroring this move to co-operation, coupled with the vigorous Soviet press, which had been writing about environmental issues since the end of the 1960s, each bloc seemingly developed environmental regulations at a national level.⁷³ In the USSR, the 1970s saw the adoption of some environmental regulations. Control over pollution advanced at a slower pace than the most developed regulations regarding the protection of the natural habitat.

Yet, by the time perestroika was formulated, the USSR was in a state of acute environmental crisis. Soviet concern for the protection of *priroda* (nature) mainly resulted from the high levels of pollution and the unsustainable exploitation of natural resources, as well as from prominent examples of Soviet environmental catastrophes.⁷⁴ Virtually encompassing all aspects of Soviet public life, perestroika was intended to radically restructure the Soviet economy and establish a more decentralized decision-making system. On the one hand, as N. Robinson points out, such an endeavour risked being compromised in favour of short-term economic reforms or revitalization (referred to as *uskorenje*).⁷⁵ On the other hand, however, the programme to restructure the national economy provided a good opportunity to assess the level of unsustainability of the previous system and push forward the enactment of environmental protection rules. Thereby, perestroika became the most fruitful 'wider programme' in which both environmental legislation and institutional building would emerge and the protection of the environment became part of the national rule of law system. Essential elements of perestroika, such as decentralization and transparency, undoubtedly facilitated the reflection of the growing social concern for environmental issues in economic revitalization plans, the implementation of which was sometimes so complicated that the 'not

⁷² ROBINSON, *supra*, at 353.

⁷³ For instance, article 42 of Fundamental Law (health protection by measures to improve the environment); article 67 (duty to protect nature and conserve its riches). It is generally acknowledged that the Soviet environmental protection evolved more rapidly on issues related to the protection of the natural habitat than other questions such as pollution. Protection of the natural habitat was indeed historically rooted, since Lenin's initiation of conservation programmes in 1918 seeking the reforestation of areas devastated in the war. ROBINSON, *supra*, at 368.

⁷⁴ See for instance, M. FESHBACH and A. FRIENDLY, *Ecocide in the USSR: Health and Nature under Siege*, 1992, (New York: Basic Books); also C.E. ZIEGLER, *Environmental Policy in the USSR*, 1987, (Amherst, Mass.: University of Massachusetts Press); and M. I. GOLDMAN, *The Spoils of Progress: Environmental Pollution in the Soviet Union*, 1972, (Cambridge, Mass.: MIT Press).

⁷⁵ N. ROBINSON, 'Perestroika and Priroda: Environmental Protection in the USSR', (spring 1988) *Pace Environmental Law Review*, vol. 5, issue 2, pp. 351-423, at 374.

in my backyard' Soviet movement emerged.⁷⁶ In December 1986, only eight months after the Chernobyl nuclear disaster, and undoubtedly influenced by the scale, nature and magnitude of this damage to human health and the environment, the Statute book ('Digest', *Svid zakonov SSS*) consolidated Soviet environmental law.⁷⁷

In applying perestroika to the problem of protecting *priroda* (nature), institutional reforms followed.⁷⁸ The radical reorganization of environmental protection in Soviet territory came with the creation in 1988 of the Federal State Committee of Environmental Protection (*Goskompriroda*), along with the creation of Committees for Environmental Protection in Republics and Local Regions.⁷⁹ This major institutional development was expected to increase the level of effectiveness and implementation of the previously consolidated environmental regulations. The Committee was thus empowered with significant competences, allowing it to decide the shutdown of too highly polluting factories. As O. Kolbasov and Butler explain, the Soviet methods of environmental protection – mainly based on improving the planning system – differed from the American ones – essentially based on damages injunctions.⁸⁰ All in all, as Robinson affirms, by 1988 environmental protection was becoming a substantial field of endeavour in the USSR.⁸¹

2.2.2. 'International Ecological Security': Combined Product of National Environmentalism and the Reification of International Law

⁷⁶ *Ibid.*, at 399: 'Not in my backyard' movement (NIMBY) is a battle cry which is heard nowadays from Latvia to Georgia, from the Ukraine to Siberia'. As Robinson explains, this movement emerged at a local level as an organized phenomenon of citizen opposition to polluting projects.

⁷⁷ Butler reproduces in English the scheme of the Digest, structured in eight parts which cover legislation on the land, minerals, water, forestry sectors, as well as the protection of the atmosphere, wildlife and 'natural wealth of the continental shelf'. See W. E. BUTLER, 'Law Reform in Soviet Environmental Law,' *supra*, at 427-428. The rationale of this new environmental legislative and institutional process was underpinned a year later in Gorbachev's statement: 'We spent, in fact we are still spending, far more on raw materials, energy and other resources per unit of output than other developed nations. Our country's health in terms of natural and manpower resources has spoiled, one may even say corrupted, us', in M. GORBACHEV, *Perestroika: a New Thinking for our Country and the World*, 1987 (New York: Harper and Row), at 373.

⁷⁸ For a detailed account, see ROBINSON, *supra*, at 366-387.

⁷⁹ Kolbasov explains that the process of creation started in 1986, when the central committee and council of ministers introduced a special decree to establish a state committee on the environment in each Union republic, replacing many different bodies, agencies and departments. Same recommendation was taken to the all-union council of ministers in 1987, and finally the state committee for the protection of environment was established. Hence reform started from the local level to the federal level, not the other way around, and the committee displayed virtually the equivalent functions undertaken in the United States by the Environmental Protection Agency. See ROBINSON, *supra*, at 367.

⁸⁰ O. KOLBASOV, 'Environmental Law Administration and Policy in the USSR' States', (spring 1988) *Pace Environmental Law Review*, vol. 5, issue 2, pp. 439-444; and W. E BUTLER, 'Law Reform in Soviet Environmental Law', *supra*, at 425.

⁸¹ ROBINSON, *supra*, at 1.

In parallel to the exponential legislative and institutional developments, the academic field also made important contributions to the launch and consolidation of Soviet environmental protection. These efforts were displayed in particular through the Institute of State and Law, directed at the time by Oleg Kolbasov and closely connected with the USSR Academy of Sciences. Following the publication of the Soviet environmental 'Digest', these institutions organized and hosted in 1987 a major Conference which facilitated intellectual exchange between international scholars from both blocs. It also had a political impact, as it reinvigorated the USA–USSR Agreement for Cooperation in the Field of Environment and was an occasion to show, a few months after the Chernobyl disaster, that Soviet national awareness and concern for environmental protection was on the rise. Most importantly, the Conference offered a scenario for Soviet scholars (closely linked to the political spheres) to present the view that national or international environmental protection ought to be properly conceived; it ought to be also associated with the objectives of maintaining international peace and of eliminating the nuclear threat. In Kolbasov's words, clearly explaining this connection, *'in the Soviet Union, environmental protection is understood to be a complex global, national and historical problem. A major factor necessary to solve this problem is peace – the elimination of the threat of thermonuclear war which casts doubt on the continued existence of the human race'*.⁸²

The association of both political and normative objectives thereby set the conceptual basis for the notion of 'ecological security' – born out of Soviet legislative and institutional developments – to acquire an international dimension. Soviet doctrinal circles thus began using the term 'international environmental security',⁸³ which called for the opening of a new stage of East–West co-operation governed by international law. As perestroika facilitated the opening of the Soviet Union to both international law and international institutions, the next stage undergone by the notion would unsurprisingly take place within United Nations organs.

⁸² O. KOLBASOV, 'Modern Ecological Policy and the Utilization of a Global Environmental Protection Strategy', (spring 1988) *Pace Environmental Law Review*, vol. 5, issue 2, pp. 445-454, at 448

⁸³ The proliferation of articles on 'international environmental security' includes: A. S TIMOSHENKO, 'Ecological Security: the International Aspect', (autumn 1989) *Pace Environmental Law Review*, vol. 7, issue 1, pp. 151-160; A. TIMOSHENKO, 'The Global Environmental Security: International Legal Aspects', (1989) *Soviet State and Law*, vol. 1; O. KOLBASOV, 'Modern Ecological Policy and the Utilization of a Global Environmental Protection Strategy', (spring 1988) *Pace Environmental Law Review*, vol. 5, issue 2, pp. 445-454; O. KOLBASOV, 'The Concept of Environmental Security' (Legal Aspects), (1988) *Soviet State and Law*, vol. 12; and S. VINOGRADOV, 'International Environmental Security: the Concept and its Implementation', in A. CARTY and G. DANILENKO (eds.), *Perestroika and International Law*, *supra*, pp.196-207.

3. 'INTERNATIONAL ENVIRONMENTAL SECURITY' IN THE LATE PHASE OF THE COLD WAR: INCLUSION IN THE AGENDA OF THE UNITED NATIONS (1985–1991)

The configuration of environmental protection at a Soviet (federal) level was conceived as a means of serving the purpose of achieving a higher degree of international security. This section provides an explanation of why and how such an idea was introduced into the agenda of the United Nations. The debate over the notion that took place in several United Nations organs between 1985 and 1989 was subsumed under a wider, highly controversial Soviet proposal for a 'Comprehensive System of International Peace and Security'. Until the project was annulled by the break-up of the Soviet Union, international environmental security developed two facets: one 'positive dimension' – inviting the development of international environmental co-operation; and one 'negative dimension' – associated with the disarmament goal.⁸⁴

3.1. The Positive Dimension: 'International Environmental Security' as International Environmental Co-operation (Phase One: 1985–1987)

3.1.1. A Controversial Framework: Gorbachev's Project for a 'Comprehensive System of International Peace and Security'

The introduction of the notion of international environmental security results from a process launched in the mid-1980s, when the general political will in the corridors of the UN was pointing to the revision of formerly adopted resolutions and programmes on strengthening international peace and security. The history of the debate on a 'Comprehensive System of International Peace and Security' may thus be traced back to the 40th session of the UN General Assembly, in 1985. That year, Mikhail Gorbachev was elected head of the Communist Party of the Soviet Union, while the United Nations solemnly proclaimed 1986 as

⁸⁴ The notion of security received important conceptual input from peace researchers from the 1950s to the 1970s. Theoretical developments from this trend came with an oppositional concept, which worked through security but argued that it should be replaced by that of peace. The first way in which Peace research worked through security was by tracing a distinction between 'positive peace' and 'negative peace'. Such differentiation, which permitted rearticulation of the understanding of security in Strategic Studies, was first formulated in 1964 by Johan Galtung, the founding father of the discipline, in the inaugural editorial of the *Journal of Peace Research*. Galtung's description of this essential dichotomy states: '*One may now look upon peace research as research into the conditions for moving closer to the state we have called GCP [General and Complete Peace], or at least not drifting closer towards GCW [General and Complete War]. Thus, there are two aspects of peace as conceived of here: negative peace which is the absence of violence – and positive peace which is the integration of human society. Correspondingly, there are two branches of peace research*'. See J.GALTUNG, 'An editorial', (1964) *Journal of Peace Research*, vol. 1, issue 1, pp.1-4, at 2. This division in fact reflects Johan Galtung's distinction between 'positive peace' and 'negative peace', reproduced in the respective division of work of the Security Council and the General Assembly.

the International Year of Peace, on its fortieth anniversary celebration.⁸⁵ Preparing for the year to come, the Assembly approved, during the same session, two resolutions already indicating that previous international peace and security co-operation policies ought to be revisited. General Assembly Resolution 40/158 called for a revision of the implementation of the Declaration on the Strengthening of International Security, while the following Resolution, 40/159, highlighted the deficiencies and main challenges raised on the international scene for the implementation of the collective security provisions of the Charter for the Maintenance of International Peace and Security.⁸⁶ A scent of revision and possible innovation with respect to the core function of the Organization was therefore in the air.

Updating United Nations action in the field of security to the new realities of the international political scene was every day more pressing, not only for the Organization, but also and most prominently, for the Soviet government; having abandoned the arms race policy, it became correspondingly necessary to build up a new international security strategy.⁸⁷ The matter was dealt with in 1986 by the 27th Congress of the Communist Party of the Soviet Union. Part III of the Programme of the Party – approved by the Congress and devoted to the ‘Tasks of the CPSU on the International Scene, in the Drive for Peace and Social Progress’ – reaffirmed the Leninist principle of peaceful coexistence and for the first time adopted a programme of action for a ‘comprehensive international security system’. Soviet authors

⁸⁵ UNGA Res. 41/9, International Year of Peace, adopted on 24 October 1986, 49th plenary meeting, document reference: A/RES/41/9. Such pronouncement on what would become the main ‘goal’ of the following session was not improvised, but had been decided by the General Assembly, following a 1982 recommendation of the Economic and Social Council in Resolution 37/16 which invited: ‘[A]ll States, all organizations within the United Nations system and interested non-governmental organizations to exert all possible efforts for the preparation and observance of the International Year of Peace, and to respond generously with contributions to attain the objectives of the Year.’ See UNGA Res. 40/159, ‘Implementation of the Collective Security Provisions of the Charter for the Maintenance of International Peace and Security’, adopted on 16 December 1985.

⁸⁶ UNGA Res. 40/158, ‘Review of the Implementation of the Declaration on the Strengthening of International Security’; and UNGA Res. 40/159, ‘Implementation of the Collective Security Provisions of the Charter of the United Nations for the Maintenance of International Peace and Security’, both adopted at the 117th plenary meeting of the 40th session of the UN General Assembly, on 16 December 1985.

⁸⁷ V. PRETROVSKY, ‘A Dialogue on Comprehensive Security’ (November 1989) *International Affairs*, vol.4 pp. 1-13, at 3. The author, Deputy Minister of Foreign Affairs of the USSR at the time when he wrote this article, clearly explains: ‘The idea of comprehensive security is a logical result of the objective course of world development. In the early 1980’s, international relations reached a turning point. On the one hand, trends towards [...] an intercrossing of economic, environmental and socio-humanitarian interests won obvious dominance. On the other hand, a confrontational differentiation along ideological, political and other subjective lines persisted’. See also the explanation provided by P. VLADIMIRSKY ‘Comprehensive Security Equal for All’, (October 1987) *USSR Report: International Affairs*, pp. 9-19. See also, M. McWIRE, *Perestroika and Soviet National Security*, 1991, (Washington D.C.: the Brookings Institution), chapters 2 and 3, pp. 14-76.

asserted that both notions – peaceful coexistence and a comprehensive international security system – are in fact theoretically inseparable from one another, for the latter is in fact the foundation of the former.⁸⁸ The Programme linked the notion of a comprehensive security system to the development of a Soviet foreign policy based on disarmament and increased international co-operation under the auspices of the United Nations.⁸⁹

Following the CPSU Congress, a proposal for the introduction of a comprehensive system of international peace and security was launched in the United Nations by a letter from the foreign ministers of the Soviet Union and a group of socialist countries to the UN Secretary-General.⁹⁰ The proclamation of 1986 as the International Year of Peace provided for a particularly favourable climate for innovative proposals on how the international co-operation should be conducted in the years to come. At the time when the proposal was launched, the beginning of a revision phase of the means to strengthen international security, particularly focused on the improvement of diplomatic and political dialogue, was formally under consideration.⁹¹ The proposal was finally approved by General Assembly Resolution 41/92,⁹² with a widespread and overwhelming support of 102 votes in favour, 46 abstentions, and only 2 votes against, those of the United States of America and France. The voting record permits the assertion that a considerable part of the non-aligned movement supported the proposal or even actively co-sponsored it. The Resolution implied that the concept was

⁸⁸ V. FYODOROV, 'The UN and a Comprehensive International Security System', (September 1987) *USSR Report: International Affairs*, pp. 90-95, at 90: '[t]he draft program for a comprehensive international security system aimed at laying the foundation of peaceful coexistence and ensuring the sovereignty, independence and cooperation of all nations'.

⁸⁹ Programme of the 27th session of the Communist Party of the Soviet Union available online at: <<http://www.xs4all.nl/~eurodos/docu/cpsu-texts/cpsu86-0.htm>>: 'The Party will work for the development of the process of international detente, regarding it as a natural and essential stage on **the road to the establishment of a comprehensive and reliable security system**. The experience of cooperation shows that there is a real prospect for this. The CPSU stands for the creation and use of international mechanisms and institutions that would make it possible to find optimal correlations between national, state interests and the common interests of mankind. It stands for enhancing the role of the United Nations in strengthening peace and developing international cooperation' [Emphasis added].

⁹⁰ The Governments that launched the proposal were: Bulgaria, Byelorussia, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Rumania, Ukraine and the Soviet Union.

⁹¹ Indeed, meanwhile, the adoption of UNGA Res. 41/90, on 'Review of the Implementation of the Declaration on the Strengthening of International Security' and UNGA Res. 41/91, on the 'Need for Result Oriented Political Dialogue to Improve the International Situation', both adopted on 4 December 1986, at the 96th plenary meeting, documents reference: A/41/904, indicated that the wider and general trend initiated with the previously cited UNGA Res. 40/158 and UNGA Res. 40/159 had been followed up.

⁹² UNGA Res. 41/92, 'Establishment of a Comprehensive System of International Peace and Security', adopted with 102 votes in favor, 2 against and 46 abstentions, on 4 December 1986, 96th plenary meeting, document reference: A/41/906.

introduced as an agenda item of the General Assembly; discussions bearing on the concrete meaning, scope and purpose of the proposal were thus about to follow.

The 'Comprehensive System of International Peace and Security' (CSIPS) proposal anticipated the effects that perestroika would nurture in the international community. It was a prelude to the conceptual crystallization of the radical change of thinking of the Soviet Union on how to conduct international relations and construct international peace and security. Thereby, the reification of universal human values, moral grounds of the proposal for a comprehensive international security system, unsurprisingly matched those affirmed later on in the context of perestroika. Also, the increasing interdependence of the economic, environmental and social fields served as a practical foundation for facilitating the launch of this new Soviet approach at that specific time of the Cold War history. On 18 September 1987, the major conceptual explanation of the meaning, scope and purpose of the CSIPS was set up in the famous speech 'Reality and Safeguards for a Secure World' delivered by President Gorbachev during the 42nd session of the UN General Assembly.⁹³ The statement traced back the origins of the proposal to the 1975 Helsinki Final Act, whereby the link between security and environment had been institutionalized in 'Basket 2'.⁹⁴ Indeed, just as the architecture of the Conference on Security and Co-operation in Europe (CSCE), the proposal for a comprehensive international security principle was conceived as 'bi-dimensional': the 'positive pillar' corresponded to the development of international co-operation – driven by the principle of the primacy of international law – in areas such as the environment where interdependence was a fact; whereas the 'negative pillar' encapsulated the need to improve international co-operation in the military field, strictly speaking, and would be fostered notably through active Soviet policy on the enhancement of international disarmament and nuclear control. Gorbachev placed 'ecological security' as an autonomous item within the proposal for a comprehensive system of international peace and security, and provided for a definition of the notion initially centred on the 'positive' facet of the concept (namely, environmental co-operation):

⁹³ M. GORBACHEV, 'Reality and Safeguards for a Secure World', statement dated 18 September 1987 and attachment of the Letter of the Deputy Head of the Delegation of the Union of Soviet Socialist Republics to the 42nd session addressed to the Secretary-General, document reference: A/42/574, 18 September 1987. The speech was the article he had recently written on the occasion of a visit to India, which he ordered to be distributed among the delegates of the UN Member States to the Plenary of the General Assembly under agenda item 73 (entitled 'Comprehensive System of International Peace and Security').

⁹⁴ *Ibid.*, at 9. In GORBACHEV's words: 'The starting point of this could be what has been achieved in this respect within the framework of the Helsinki process'.

‘[T]he events and trends of recent decades have broadened this concept [international peace and security] and given it new features and characteristics. **[P]roblems of ecological security affect us all, rich and poor alike. A global strategy for environmental conservation and the rational utilization of resources is required.** And we propose that work be started on this, too, within the framework of the specialized United Nations Programme’.⁹⁵

3.1.2. An Innovative Component: The Draft Proposal on ‘International Ecological Security’ at the Second Committee of the General Assembly on Economic and Financial Matters

On this basis, development of the notion followed within the Second Committee of the General Assembly on Economic and Financial matters,⁹⁶ tasked with issues ranging from economic growth to development. On 23 October 1987 – barely a month after Gorbachev’s speech – the Second Committee held its 21st meeting. Chaired by the Ukrainian Soviet Socialist Republic, it debated on Agenda Item 82 on Development and International Economic Cooperation, embracing the sub-items on ‘environment’ and on ‘desertification and drought’.⁹⁷ Discussions of the future of environmental co-operation had already been initiated, as the release of the report of the Brundtland Commission on Environment and Development was expected. Yet, the debate of the Second Committee brought about a new turn on the matter of environmental co-operation which anticipated the future development of the ‘negative pillar’ of ecological security. Firstly, the opening words of A. Arsenko, Deputy Permanent Representative of Ukraine, acting as Chairman of the Committee, highlighted the impacts of the arms-race policy on the environment. He therefore called for the inclusion of a programme in the mid-term mandate of UNEP akin to the existing special programme on ‘Peace, the Arms Race and the Environment’.⁹⁸ This suggestion was then supported by the Czechoslovakian delegate, who considered that:

‘The environmental threat was becoming a dangerous destabilizing factor and a source of increased tensions in international relations. International environmental security would guarantee respect for the right of every country to environmentally sound development [...] The principles of such a code might include the **requirement of a constructive and non-**

⁹⁵ GORBACHEV, *supra* note 66, pp. 5-8. [Emphasis added]. He further declared that: ‘To recognize the need for opening a common front of economic and ecological security to move towards establishing it would be to deactivate the time bomb that history and people themselves have planted under everyone’s lives [...] how do we envisage this system ? [...] on confidence-building measures and international cooperation in all fields, military, political, economic, ecological, humanitarian, and so forth’, at 8. Reference to the ‘negative’ side of the concept of environmental security remained when he made this reference to human survival (at the time mostly linked to the possibility of nuclear annihilation).

⁹⁶ Information on the Second Committee (ECOFin) is available at: <http://www.un.org/en/ga/second/index.shtml>

⁹⁷ Summary Record of the 21st meeting of the Second Committee, 23 October 1987, document reference: A/C.2/42/SR.21, Sub-items e) and f).

⁹⁸ *Ibid.*, at 2. A. Arsenko also considered that a similar programme should be included in UNEP’s Medium-Term Plan 1990–1995.

confrontational approach to the solution of international environmental problems, the inadmissibility of environmental accidents being used as a pretext for escalating tension and hostility among States.⁹⁹

The statements from the Ukrainian and Czechoslovakian delegates thus introduced some important innovations into the original definition of 'ecological security' provided by Gorbachev.¹⁰⁰ Two days after the opening of the debate in the Second Committee, the double-faced dimension of the concept was crystallized in the Draft Resolution entitled 'International Ecological Security' and presented under item 82(e) of the Second Committee's agenda by the Ukrainian SSR and Czechoslovakian delegations.¹⁰¹ The last three paragraphs of its extensive preamble, together with the operative part, summarized well the framework in which 'international ecological security' was conceived by the two proponent Member States, the purposes of this initiative and the role to be played by the United Nations in the development of the notion:

'[R]ecognizing that the unity and interdependence of the world and the interrelationship of all spheres of human activity manifest themselves most fully in nature and the environment, **the preservation of which is perceived as part of common efforts of mankind to create comprehensive security**,

Convinced that **international ecological security could become an important contribution to confidence-building**, strengthening stability and removing tension in international relations,

Taking into consideration the close **linkage of environmental problems and the political, military, economic and humanitarian spheres of international relations**,

1. Recognizes the necessity of **exploring and developing a generally acceptable concept of international ecological security**, and, in particular, of defining relevant **basic guidelines and principles** of conduct of States;
2. Requests the Secretary-General, in cooperation with the Executive Director of the United Nations Development Programme, to outline elements that could lead to the elaboration of a generally acceptable concept of international ecological security, and to report to the General Assembly at its 44th Session under the sub-item entitled 'Environment'.'

All in all, by October 1987, the notion of 'international ecological/environmental security' was already on the agenda of the United Nations General Assembly, and its double-

⁹⁹ *Ibid.*, at 11.

¹⁰⁰ This side was nonetheless mentioned by the German Democratic Republic delegate, who '*agreed that nuclear war or military conflict involving weapons of mass destruction constituted the gravest threat to the environment and that peace and security had a direct bearing upon the concept of sustainable development*'. Summary Record A/C.2/42/SR.21, *supra*, at 15.

¹⁰¹ Czechoslovakia and Ukrainian Soviet Socialist Republic, Draft Resolution, 'International Ecological Security', document reference: A/C.2/42/L.34, 30 October 1987, presented to the Second Committee under agenda item 82.e, on Development and International Economic Cooperation (Environment).

sided dimensions had been referred to. The positive facet promoted by Gorbachev's speech,¹⁰² which stressed the need to foster international environmental co-operation as a means to build up international peace and security, possibly contributed to the normative development of international environmental law, since, two months after Gorbachev made his statement, an important set of General Assembly Resolutions reflecting an exponential development of international environmental co-operation was adopted.¹⁰³ In contrast, the negative facet of the concept, calling for disarmament as a means to ensure effective environmental protection and which had been introduced in the Draft Resolution on 'International Ecological Security' submitted by the Ukrainian and Czechoslovakian delegations, was not followed up by the Second Committee and was never submitted to the General Assembly either. Yet, the underlying rationale and purpose of this Draft Resolution would not be abandoned by the Soviet Union and its allies.

3.2. The Negative Dimension: 'International Environmental Security' as International Disarmament Co-operation (Phase Two: 1988–1991)

3.2.1. Shifting Locations: Rise of the Soviet 'Comprehensive Approach to International Peace and Security at the First Committee of the General Assembly on Security and Disarmament

¹⁰² See *supra*, note 69.

¹⁰³ The 'positive' pillar of international ecological security saw an immediate exponential progress and became the seeds of what would become a few years later the Rio Conference. It is noteworthy that by Resolution 42/187 the General Assembly directly noted the Report 'Our Common Future' of the World Commission on Environment and Development (also known as the Brundtland Commission), and put in place a series of measures leading to the implementation of the analysis and recommendations contained in the report (e.g. its transmission to all governments and the governing bodies of the organs, organizations and programmes of the UN). Part 11 of the Report provides an extensive explanation of the linkages between 'Peace, Security, Development and the Environment' and makes specific mention of the possible security implications of climate change, see paragraph 15: '*Environmental threats to security are now beginning to emerge on a global scale. The most worrisome of these stem from the possible consequences of global warming caused by the atmospheric build-up of carbon dioxide and other gases. Any such climatic change would quite probably be unequal in its effects, disrupting agricultural systems in areas that provide a large proportion of the world's cereal harvests and perhaps triggering mass population movements in areas where hunger is already endemic. Sea levels may rise during the first half of the next century enough to radically change the boundaries between coastal nations and to change the shapes and strategic importance of international waterways – effects both likely to increase international tensions. The climatic and sea-level changes are also likely to disrupt the breeding grounds of economically important fish species. Slowing, or adapting to, global warming is becoming an essential task to reduce the risks of conflict*'. Moreover, the report of the UNEP on 'Environmental Perspectives for the Year 2000 and Beyond', annexed to UNGA Res. 42/187 which takes note of the report, integrated elements and recommendations previously formulated by the Brundtland Commission, including a specific section on the issue of 'Security and the Environment'. See UNGA Res. 42/184, 'International Cooperation in the Field of Environment'; UNGA Res. 42/185, 'Biennial Cycle of Sessions of the Governing Council of the United Nations Environment Programme'; and UNGA Res. 42/187, 'Report of the World Commission on Environment and Development', resulting from the Brundtland Report, were all adopted during the 96th plenary meeting, on 11 December 1987.

In July 1988, the Warsaw Pact Declaration already indicated that the idea of linking the environment and security spheres was to be maintained by the Soviet bloc.¹⁰⁴ Yet, as a change of strategy within the UN institutions was required, the debate on the notion of international environmental security was transferred from the Second Committee (on Economic and Financial Matters) to the First Committee (on Security and Disarmament) of the General Assembly. Given the nature of the tasks and the issues falling within the mandate of the First Committee, it is not surprising that the notion of international ecological security was not discussed as a separate issue, but subsumed under the wider Soviet attempt to advance the debate on the 'Comprehensive System of International Peace and Security'. The initiative was favoured by the recent relaxation in international relations, referred to by the Cameroon delegate as the celebration of '*a kind of political Pentecost graced by a refreshing revival of faith in the United Nations*'.¹⁰⁵ The new input finally began in 1988 with the distribution by the Soviet Union, at the beginning of the 43rd session, of a memorandum entitled 'Towards Comprehensive Security through the Enhancement of the Role of the United Nations', in which the proposal to '*launch a broad international dialogue*' on the following lines was laid down:

"Our comprehensive approach to security is based on the **obvious fact that the very concept of security is made up of many components** [...] The example of the economic elements and the evolution of its significance clearly demonstrate that the very **concept of security is not something rigid, and that it is in the process of development, and changes along with changes in the life of human society**. Consequently, qualitatively new elements in what we understand by security may appear. **Thus over a few years and quite unexpectedly**

¹⁰⁴ The Warsaw Treaty Organization (or Warsaw Pact) was established on 14 May 1955 as a military and political alliance between the Soviet Union and several communist European countries that would counterbalance the North Atlantic Treaty Organization (the original signatories of the Pact were the Soviet Union, Albania, Poland, Czechoslovakia, Hungary, Bulgaria, Romania, and the German Democratic Republic). On 16 July 1988, Member States of the Organization adopted a Declaration on 'the Consequences of the Arms Race for the Environment and other Aspects of Ecological Security', in which, as its title indicates, reference to international ecological security in the Declaration linked environmental protection to the negative impacts of war as well as to the need to foster a disarmament policy. Cited in TIMOSHENKO, *supra*, at 153.

¹⁰⁵ Verbatim Record of 51st meeting of the First Committee, *infra*, at 28. Prior to the celebration of this meeting, the Secretary-General released a Report on the state of affairs with respect to agenda item 73, namely a 'Comprehensive System of International Peace and Security', document reference: A/43/732, released on 20 October 1988. The Report explained that the Soviet delegation had seen the opportunity to '**[I]aunch a broad international dialogue, above all within the United Nations, on the ways and means of ensuring comprehensive security in military, political, economic, ecological, humanitarian, including human rights, and other fields, on the basis of the strict compliance with the Charter and an enhanced role and effectiveness of the United Nations**'; it also added that '**[I]t was suggested by them [a number of international and national non-governmental organizations and political figures responding to paragraph 13 of the General Assembly Resolution 42/93] that scholars whose research is relevant to the study of a 'new definition' of global security should be consulted both by their respective governments and by the world Organization**', at 4 [Emphasis added].

the problem of the ecological threat in a number of its aspects has become one of the highest concerns of mankind.”¹⁰⁶

Thereafter, the Committee on Security and Disarmament held eight meetings, chaired by Canada, in which the Soviet proposal was heatedly discussed.¹⁰⁷ Unsurprisingly, such an all-embracing and innovative proposal on the understanding of security raised strong opposition and suspicions from some non-aligned and western States, primarily concerned that approving a resolution entitled ‘Comprehensive System of International Peace and Security’ would be interpreted as an alternative to the United Nations collective security system. The Soviet delegate defended the proposal against this criticism by stating that the concept of a comprehensive approach to international security was inherent in the UN Charter.¹⁰⁸ Finally, as a result of diplomatic exchanges, the wording of both the title of the agenda item and the Draft Resolution was modified. The word ‘system’ was replaced by that of ‘approach to strengthening peace and security’, and reinforced by an ending formula ‘in accordance with the Charter of the United Nations’.¹⁰⁹ Nonetheless, opposition to the substance of the new approach was also raised by France and the USA. France considered the distinction, in the Charter, between security and environment, as being two spheres which are subject to special treatment under the purview of different specialized agencies, and which should not be modified.¹¹⁰ The French delegate also highlighted the view that merging military and non-military threats, in the debate of the First Committee, risked jeopardizing the institutional balance provided for in the Charter.¹¹¹ France’s all-embracing objections (of both a substantive and procedural nature) were followed by the even harder opposition of the United States of America. The U.S. delegate stated that the comprehensive security approach suggested by the Soviet Union was akin to a Trojan horse, posing a serious threat to the United Nations and the security of its Member States. It therefore invited the Committee to transfer the Soviet proposal to the Special Committee for Charter Review.¹¹²

Czechoslovakia and Ukraine reacted to these opposition voices and provided grounds for the defence of the Soviet Union’s proposal. First of all, the Czechoslovakian delegate

¹⁰⁶ Annex to the Letter of 22 September 1988 from the Deputy Head of the Delegation of the USSR to the 43rd session of the UN General Assembly, addressed to the Secretary-General, document reference: A/43/629.

¹⁰⁷ See Verbatim Records of 47th to 51st meetings of the First Committee, 23rd to 30th November 1988, document references: A/C.1/43/PV.47 – PV.54.

¹⁰⁸ PV. 51, *supra*, at 20.

¹⁰⁹ For France this remained insufficient to cast away the doubts on how to interpret it.

¹¹⁰ *Ibid.*, at 15.

¹¹¹ *Ibid.*, at 13.

¹¹² *Ibid.*, at 43.

pointed out that *'in conditions that are not suitable for life any thought of ensuring security by military means loses all meaning'*¹¹³ and therefore, as the Ukrainian delegate rhetorically stated, *'comprehensive security enables us to take a broader view between the quality of the international relations and the quality of life'*.¹¹⁴ Secondly, Ukraine sought to link the Soviet Union's proposal to the follow-up of the Helsinki Final Act that was already under way, reminding the Committee that the notion of comprehensive security had been adopted as a cardinal starting point for the configuration of the CSCE architecture. Arguably, what was positive to improve the regional (European) security climate could be exported at an international level. All in all, the course of the debate benefitted the Soviet proposal, as it became co-sponsored by an increased number of States and was finally adopted as a Committee resolution, with only two votes against: those of the USA and Japan (France abstained).¹¹⁵

3.2.2. Limited Timing: Break-up of the USSR and the Legacy of the 'Comprehensive Approach to International Peace and Security' Project

Following the adoption by the First Committee of the Soviet proposal for a Comprehensive Approach to Security in accordance with the United Nations Charter, on 8 December 1988, President Gorbachev again addressed the General Assembly.¹¹⁶ He emphasized the potential of perestroika for the promotion of peace and international co-operation, reaffirmed the primacy of universal values in world politics *'regardless of ideological or other differences'*, and highlighted the need to gather efforts to solve global problems through a *'new scope and quality of interaction of states and socio-political currents'*.¹¹⁷ Soon after his plea, the General Assembly adopted Resolution 43/89, whereby the 'Comprehensive Approach to International Peace and Security' project was included in the agenda of the General Assembly. A landmark moment for the notion of 'international ecological/environmental security' would follow this success when, on 27 September 1989, Soviet Foreign Minister Eduard Shevardnadze stated before the General Assembly that *'political ecology requires the involvement of the Security Council'*.¹¹⁸ Seemingly, the time had become favourable for the notion of international environmental security to take a more

¹¹³ PV. 52, *supra*, at 7.

¹¹⁴ *Ibid.*

¹¹⁵ PV. 54, *supra*.

¹¹⁶ Address by President GORBACHEV, Verbatim Record A/43/PV.72, 8 December 1988.

¹¹⁷ *Ibid.*, at 9.

¹¹⁸ Address by E. SHEVARNADZE, Verbatim Record A/44/PV.6, pp. 26-50.

prominent place within the United Nations (particularly within the organ primarily responsible for the maintenance of international peace and security). Yet, the beginning of the disintegration of the Soviet Union, from 1989 to 1991, put a radical end to the process originally initiated under the wider project for a 'Comprehensive Approach to International Peace and Security'. Although the item was never formally taken off the agenda of the General Assembly, it never saw the light of day again.

The three main characteristics of this first stage of linking the environment and security spheres within United Nations institutions should be highlighted. First of all, it was a double-sided process, in which the notion of 'international environmental/ecological security' proved to be malleable and open to two different meanings – the 'positive' dimension called for promoting international peace and security through the development of international environmental co-operation, whereas the 'negative' dimension stressed the irreversible consequences of the arms race and the nuclear threat for a common interdependent 'asset' such as the environment. Secondly, as a result of this double-sided meaning, the concept of 'international environmental/ecological security' before the United Nations institutions was introduced as part of a wider political project and strategy nurtured by the new fundamental change of thinking in the Soviet Union about international law, which correspondingly found strong opposition within the western bloc. Thirdly, the inception of the concept of international environmental/ecological security also reflected the historical momentum when the awareness of the high level of interdependence between the two blocs in several fields (including environmental) was providing input to the conscious formation of the existence of 'global issues', useful seeds for a new stage of international environmental law to develop.¹¹⁹

4. ENVIRONMENTAL APPROACHES TO SECURITY AT THE INCEPTION OF THE NEW WORLD ORDER: FURTHER DEVELOPMENTS OUTSIDE THE UNITED NATIONS SYSTEM (1991–2007)

¹¹⁹ The Soviet Foreign Minister closed the intervention by calling to urgently co-operate in the environmental field: (seeds of climate change regulation): *'the time factor and the planetary nature of the ecological threat require that we urgently merge our efforts as States to prepare and implement a global strategy for the protection of the environment. [R]elevant in this connection is the introduction by the Soviet Union of a proposal to conduct a systematic triple cycle of special meetings on problems of coordination of efforts in the field of ecology which could conclude with a second UN Summit conference on questions on the environment by 1992 or perhaps even earlier'*. Yet, as Dalby points out, *'despite some early suggestions by Gro Harlem Brundtland and others, the term "environmental security" was apparently eclipsed by the discussions of other matters at the [1992] Earth Summit'*; see S.DALBY, 'Contesting an Essential Concept: Reading the Dilemmas in Contemporary Security Discourse', in KRAUSE and WILLIAMS (eds.), *supra*, at 15.

The break-up of the Soviet Union put an end to the first process, launched within the United Nations, whereby the environment and security spheres were conceived as being in direct association and mingled from a policy perspective. Afterwards, a 'second wave' would be brought about by the Climate Change and International Security Discourse that reached United Nations organs during the first decade of the twenty-first century. Yet, between these two stages – that is, for the period ranging from 1991 to 2007 – important theoretical developments and empirical studies developed outside the United Nations framework. This interim process constitutes as much an important part of the precedent to the Climate Change and International Security Discourse as the Soviet Union's proposal for an 'international environmental security', and is the object of study of this section.

4.1. Changing Theoretical Conceptualizations: The Environmental Component of Security in International Security Studies

As pointed out in the introduction to this Chapter, a debate in western international security studies about the practical need for and political suitability of considering non-military threats within the notion of security *preceded* the end of the Cold War; it was a debate which did not have any outreach within the United Nations system and therefore had a limited impact in the international inter-State arena. In contrast, the beginning of a new era outside the bipolar straitjacket brought about a structural crisis in the field of international security studies, as the damage to Cold War 'traditionalists' and their understanding of security was correlatively superseded by a two-fold movement. Several 'schools' saw the opportunity to highlight the narrowness of the military–state-centred agenda '*analytically, politically and normatively*';¹²⁰ while 'wideners' called for an expansion in scope of the notion of security – considering security-specific non-military sectors '*as phenomena in their own right*' (constructivists and the Copenhagen School [Copenhagen Peace Research Institute]) – 'deepeners' proposed expanding the levels of analysis of the notion and considering the referent object of security beyond the State (critical movement). The integration of environmental considerations into the notion of security thus got back to the front line of debate in western doctrinal circles.

4.1.1. Constructivism and the Copenhagen School: The 'Securitization' of the Environment

It is frequently mentioned that one of the most surprising facts of the ending of the Cold War was that at no point did realist analytical tools serve to predict it. Nor were they

¹²⁰ BUZAN and HANSEN, *supra*, at 154.

useful afterwards to explain or elucidate by a solidly structured theory the reasons why the Cold War had occurred. The end of the conflict thus gave rise to some important criticism of the realist basic tenets, which in turn affected the traditionalist notion of security conceptually from two angles. Firstly, it put at stake the identity of the referent object of security, namely the (western) State. As Samuel Huntington famously remarked, the end of the Cold War unveiled the 'enemy syndrome' of both blocs and produced a paradigm shift that he explains as follows: *'[i]n class and ideological conflicts, the key question was: which side are you on? And people could and did choose sides and change ideas. In conflicts between civilizations, the question is: what are you?'*¹²¹ Forced to face the big gap left by the end of 'The Other', the attention of western intellectual circles consequently turned towards 'The Self'. This is perhaps the cradle of the basic constructivist thought, whose core tenet states that security is a theoretical construction based on an interpretation of external events by 'The Self', rather than based on an interpretation of a situation which objectively constitutes a threat generated by 'The Other'.¹²² As pointed out by Daniel Deudney, one result of this shift of focus is that it became necessary to rethink the referent object of security (referred to as the 'subjective actor') so as to be able to understand the connections drawn by such a subjective actor with any external fact that may subsequently be categorized under the 'threat label'.¹²³ Interestingly, Deudney associated the growing awareness of the effects of environmental problems with the general effects of the 'enemy syndrome', for *'environmental problems, at its basic level, ask us who we are and who "us" encompasses'*.¹²⁴ Secondly, the ending of the Cold War embodied the loss of an analytical superstructure, so that the obsolescence of a 'balance of power in a bipolar world' framework generated the necessity of beginning an

¹²¹ S. HUNTINGTON, 'The Clash of Civilizations?' (summer 1993) *Foreign Affairs*, vol. 72, at 27. [Emphasis added]. Particular attention to the importance of 'The Other' can be found for instance in the work of D. CAMPBELL, *Writing Security: the United States Foreign Policy and the Politics of Identity*, 1992, (Minneapolis, Minn.: University of Minnesota Press). Besides, as Buzan and Hansen recall, the question of whether States needed enemies was confronted mainly by post-structuralism, one branch of the widening-deepening movement that was born before the end of the Cold War and which was indebted to the classical Realist tradition, since it argues that state sovereignty and security are not easily transformed. In BUZAN and HANSEN, *supra*, at 218.

¹²² See B. KLEIN, 'Conclusion: Every Month is "Security Awareness Month"', in KRAUSE and WILLIAMS (eds.) *supra*, at 363, who explains: *'The theoretical construction around the notion of security born in part from the collapse of the narrative and subsequent need of the field to reinvent its own existence in a hostile environment (...). Security considerations are not objectively gleaned from a neutral road map of world politics, they are themselves socially constructed and discursively reproduced in ways that are contestable and subject to revision.'* [Emphasis added].

¹²³ See D. DEUDNEY and R. MATHEWS, *Contested Grounds: Security and Conflict in the New Environmental Politics*, 1999, (New York: State University of New York Press), at 199. Recalling the comic-strip figure by Pogo, the authors conclude *'we have met the enemy, and the enemy is us'*.

¹²⁴ *Ibid.*

entirely new process that would enable the identification of the causes of war and instability. Thus, in the absence of what Barry Buzan and Ole Waever referred to as a 'macrosecuritization event',¹²⁵ most international relations theories developed under strategic studies underwent a thorough re-examination and revision; united by their '*challenge to military-State centrism*', a multiplicity of branches adhered to what is known as the 'widening and deepening movement' of international security studies.¹²⁶

The main 'wideners' that emerged after the end of the Cold War and which had an impact on the consideration of environmental issues in the context of security were Constructivism and the Copenhagen School (the latter described by Matt McDonald as '*the most concerted attempt to develop a theory or framework for the study of security in the constructivist tradition*').¹²⁷ As Barry Buzan explains, conventional constructivism was born out of P. Katzenstein's landmark work and was the 'least radical' widening approach to security, as it '*fails to engage security critically*' and embraced the same rationalist (rather than reflective) case-study research methodology as that of the traditionalists.¹²⁸ More relevant for the introduction of environmental considerations into the notion of security was critical constructivism, which diverged from conventional constructivism by the mid-1990s, criticized the reification of the State as the preferable object of security studied by conventional constructivism, and focused on identity issues and their corresponding effects on the interpretation/representation of events that generate security policies (that is, security is

¹²⁵ B. BUZAN and O. WAEVER, 'Macrosecuritization and Security Constellations: Reconsidering Scale in Securitization Theory' (2009) *Review of International Studies*, vol. 35, pp. 253-276. Macrosecritizations such as the Cold War, allegedly the 'Global War on Terror', and possibly, in the future, climate change, are defined as events which entered the realm of security policy and structured international politics on a larger scale beyond middle-range collectivities. See BUZAN and HANSEN, *supra*, at 214, 254 and 267. For an explanation of the securitization theory, see *infra*.

¹²⁶ The original division between strategic studies and negative peace research collapsed after the end of the Cold War, for both trends continued to work within a military-State-centred security agenda. Consequently, the new dividing lines after 1991 were drawn between 'post-Cold War traditionalists' (strategic studies and negative peace researchers) and the 'wideners and deepeners' movement. Both trends have coexisted ever since.

¹²⁷ M. McDONALD, 'Constructivism', in P. WILLIAMS (ed.), *Security Studies: An Introduction*, 2008, (London and New York: Routledge), at 68. Post-structuralism and feminism had both emerged before the end of the Cold War and also indirectly helped the integration of environmental considerations into the notion of security. Post-structuralism fed the debate on the expansion in the scope of the notion of security since the 1980s, but was indebted to the classical Realist tradition. The post-structuralists and the feminists can therefore be considered as 'limited wideners'. The feminism trend, driven by Cynthia Enloe and J. Ann Tickner, called for an expansion of the referent object of security in order to demarginalize women and advocated its replacement by a different 'collective' concept of security.

¹²⁸ See P. KATZENSTEIN (ed.), *The Culture of National Security: Norms and Identity in World Politics*, 1996, (New York: Columbia University Press). See also the explanation drawn by BUZAN and HANSEN, *supra*, at 196.

understood as a context-specific social construct).¹²⁹ Although neither of these two schools dealt directly with how environmental considerations could or should be incorporated into the notion of security, they indirectly contributed to produce this effect by influencing the inception of the Copenhagen School (Copenhagen Peace Research Institute).

Created in Europe to broaden the definition of security so as to include concerns neglected by the traditionalists, the Copenhagen School produced the most interesting conceptual innovations in the concept of security from a constructivist 'traditional' standpoint, directly giving a place to environmental security, as such, in the security discourse, through the creation of two main taxonomies – 'securitization processes' and 'security sectors'. The starting point of this trend is the idea that the meanings of security originate from '*inter-subjective processes with political effect*'. It thus places the study of linguistics at the centre of its research and, openly engaging with the notion of security, gives rise to a '*discursive approach to security*'.¹³⁰ From there on, the Copenhagen School first comes up with a definition of the notion of 'societal security', understood in the words of Wæver as '*the ability of a society to persist in its essential character under changing conditions and possible or actual threats*'.¹³¹ Thereby, the Copenhagen School accepts two possible referent objects of security: the State and society, excluding both the individual level and the global level. This characteristic places the Copenhagen School in an eclectic trend between traditionalists and critical constructivists. Furthermore, while considering that the '*possible or actual threats*' are '*linked to an objective definition*', the Copenhagen School does not neglect how the identity of the referent object has an impact on the characterization of an objective situation as a threat. Such a relation is encapsulated in the notion of 'securitization', according to which, security results from a process whereby: (1) a 'securitizing actor' (the referent object of security) defines a particular issue as an 'existential threat'; (2) such labelling is accepted by a relevant audience which (3) results in the introduction of the threat securitized in the (exceptional) realm of security policy.¹³² Securitization theory is thus dependent upon the notion of 'speech

¹²⁹ BUZAN and HANSEN, *supra*, at 213.

¹³⁰ *Ibid.*, at 213.

¹³¹ O. WAEVER, B. BUZAN, M. KELSTRUP and P. LEMAÎTRE, *Identity, Migration and the New Security Agenda in Europe*, 1993, (London: Pinter), at 23.

¹³² O. WAEVER first referred to securitization as a discursive construction of threat. See, O. WAEVER, 'Securitization and Desecuritization', in R. LIPSCHUTZ (ed.), *On Security*, 1995, (New York: Columbia University Press), pp. 46-86. This idea was then developed by B. BUZAN, O. WAEVER and J. DE WILDE in *Security: A New Framework for Analysis*, 1998, (Boulder, Colo.: Lynne Rienner), at 25, describing securitization as '*[i]f by means of an argument about the priority and urgency of an existential threat the securitizing actor has managed to break free of procedures or rules he or she would otherwise be bound*

acts' found in J. Austin's language theory, since, during the securitization of a threat, security becomes a '*site of negotiation between speakers and audiences*'.¹³³ Thirdly, the Copenhagen School puts forward the notion of 'security sectors', defined as '*fields of activity or arenas that entail particular forms of security interactions and particular definitions of referent objects*'.¹³⁴ Five different security sectors have been listed by Buzan: the military sector (entailing relationships of forceful coercion); the political sector (entailing relationships of authority, governing status and recognition); the economic sector (entailing relationships of trade, production and finance); the societal sector (entailing relationships of collective security) and, last but not least, the environmental sector (entailing relationships between human activity and the planetary biosphere).¹³⁵

The 'widening' operated by the Copenhagen School can be said to be ambivalent. On the one hand, it is considered by its proponents to constitute 'real widening', in that each of the security sectors is 'eligible' for consideration under a security prism irrespective of whether or not it affects the '*military capacities of the State*'. Any parts of the security sectors mentioned can be subject to securitization if an 'essential threat' originating in a sector is perceived as such by the relevant audience.¹³⁶ Henceforth, 'environmental security' acquired the capacity to become an independent notion with autonomous standing in the security discourse.¹³⁷

Yet, such autonomous standing is limited by the overall framework of analysis underlying the Copenhagen School. First, it does not escape the realist State-centred approach to security, as the State remains the primary referent object for security and it is State 'elites' (the political power) who are the actors in the securitization (that is, the 'relevant

by, we are witnessing a case of securitization'. Correlatively, 'de-securitization' is defined as the process whereby an issue re-enters the realm of normal politics.

¹³³ BUZAN and HANSEN, *supra*, at 213. The authors also name the '*Schmittian understanding of security and exceptional politics*' and '*traditional security debates*' as the other two roots of the securitization theory. The discursive approach to security proposed by the Copenhagen School thus considers security as a 'thick signifier', and put the focus on the function of security in social life rather than in its inherent definition.

¹³⁴ McDONALD, *supra*, at 70.

¹³⁵ K. BOOTH, *Theory of World Security*, 2007, (Cambridge, UK: Cambridge University Press), at 162.

¹³⁶ BUZAN and HANSEN, *supra*, at 189, define 'real widening' as '*consider[ing] specific non-military sectoral dynamics as phenomena in their own right*'.

¹³⁷ This contrasts clearly with the previous broadening suggested by some strategic thinkers in the 1980s, regarding which, Ken Booth explains the difference, as follows: '***This was broadening without a theory, but such inconsistency among realists is not surprising because of the clash between their desire to maintain their power credentials while responding to their experiences in a changing world***'. In K. BOOTH, *supra*, at 161. [Emphasis added].

audience’).¹³⁸ Environmental problems with effects at infra-statist (individual) or supra-statist (regional or global) levels of analysis would therefore not fall within the ‘environmental security sector’ – unless the elites of such States decide to engage in the securitization process of one of them, presumably out of circumstantial political interest. Limiting the acceptance of possible ‘sites’ for securitization to the State – and eventually also to ‘society’ – disregards the most important levels where environmental problems empirically manifest themselves, for, as Miriam Lowi and Briand Shaw point out, *‘space is a critical variable of environmental and security relationships and the spatial dynamics shift from globally to locally’*.¹³⁹ Secondly, following up this last point, environmental security – as security in general – does not exist outside ‘discourse’. In other words, under the Copenhagen School perspective, there is no objective reality of environmental problems being a security threat outside the linguistic construction of a fact as such. Such a limitation is highly controversial and, as Ken Booth criticizes, *‘[t]he discourse-centric approach to security misses chunks of reality, and is based on the fallacy that threats do not exist outside discourse. They clearly do so, empirically. The danger posed by global warming to low-lying island States was a physical process long before the discourse on environmental security was invented by its proponents and listened to by their audiences’*.¹⁴⁰

These two main limits to the broadening goal of the Copenhagen School permit the assertion that this *‘branch remained, just as traditionalists, stuck in the main “Cold War mindsets”*.’ Critical security studies would take on this point and develop further the theory of security, which provided a radical new framework for the notion of environmental security to expand.

4.1.2. Critical Thinking of Security: Redefining Sovereignty in the Ecological Era

The more radical conceptual innovations of the notion of security were operated by critical security studies. This branch of international security studies, essentially conformed to by the European Welsh School (also known as the Aberystwyth School), was built up from the

¹³⁸ Critical thinkers later on sanctioned this ‘top down’ elitist perspective. See, K. BOOTH, *ibid.*, at 166.

¹³⁹ M. LOWI and B. SHAW (eds.), *Environment and Security: Discourses and Practices*, 2000, (New York: Palgrave MacMillan), at 5.

¹⁴⁰ BOOTH, *supra*, at 165.

quest for a real new paradigm that would transform the existing understandings of the notion of security.¹⁴¹

To begin with, 'non-critical' security thinking conceives security as a 'derivative concept' (i.e. which cannot be self-referential and therefore depends on the existence of a 'referent', an 'object' and an 'agent' to make it become a realm of study).¹⁴² Thus, from a traditional perspective, 'security' does not exist on its own, without reference to whom is protected, how protection is ensured, and against what protection is needed. Despite the fact that critical security studies also consider that security is a derivative concept, it differs from the traditional perspective in so far as, in Mark Horkheimer's words, traditional theory leads to the '*reification of ideas into institutions that are represented as immutable facts of life, whereas critical theory discards rigid distinctions between subject and object*'.¹⁴³ Critical theory is in this sense opposed to realist and neorealist perspectives on security – which fail to take into account the historical processes that have produced them – and rejects their alleged neutral morality which falls short of proposing alternative feasible transformations of the existing world they describe.¹⁴⁴ In contrast, at the heart of the Welsh School lies the aim to find the new grounds of a political order whereby it will be possible to identify referents and actors of security which are operative in today's globalized world. Bearing this principal purpose in mind, and considering that '*security is what we make of it*', the role of the scholar becomes important.¹⁴⁵ In order to move beyond the general discussion on the nature of security, the Welsh School stressed the need to refocus the debate and find a new analytical framework through which the relationship between environment and security could be re-conceived from scratch.¹⁴⁶ To come up with this new analytical framework, the critical school defies both 'Statism' – understood as '***the normative position that treats the State as the ultimate referent***

¹⁴¹ For an explanation of the origins and main tenets of the Welsh School (including its relation with the Frankfurt School), see P. BILGIN, 'Critical Theory', in P. WILLIAMS (ed.), *supra*, pp. 89-102; and BUZAN and HANSEN, *supra*, pp. 205-208.

¹⁴² The early explanation of Wolfers of security as an 'ambiguous concept' directly derives from this inherent conceptual dependence of security. See WOLFERS, *supra* (introduction to this chapter).

¹⁴³ See M. HORKHEIMER, 'Traditional and Critical Theory', in M. HORKHEIMER, *Critical Theory: Selected Essays*, 1972, (New York: Crossroad Publishing Company), pp. 188-243. First published in 1937 – and part of the philosophical and sociological movement that came to be known as the 'Frankfurt School' – this article set up the founding layers and the agenda for critical theory, which developed most prominently, after World War II, from the hands of Herbert Marcuse and Jürgen Habermas.

¹⁴⁴ Indeed, the lack of a prescriptive goal is considered by critical thinkers as being openly conservative rather than morally neutral.

¹⁴⁵ See M. WILLIAMS and K. KRAUSE (eds.), *Critical Security Studies: Concepts and Cases*, at xiii (Preface), *supra*, at xiii, who explain that the approach of critical security studies to security '*is that of a stranger but not of an outsider*',

¹⁴⁶ LOWI and SHAW, *supra*, at 3.

object and agent of security', and 'State-centrism' – or consequent '**methodological choice of taking the State as the central actor and concentrating on its practices when studying the international phenomena**'.¹⁴⁷

On the one hand, the limits of Statism and State capacities to ensure security are particularly stressed; while Simon Dalby explains that '*discussions of reformulating security also coincide with the widespread recognition of the limits of formal sovereignty in the modern world*',¹⁴⁸ Patricia Mishe considers that the origins of this limitation lie in '*the transboundary and interdependent nature of environmental threats [which] defies existing concepts of state sovereignty: the Earth does not recognise sovereignty as we now define it*'.¹⁴⁹ Henceforth, the Critical School considers that security ought to be defined globally – and practised locally.¹⁵⁰ As the central focus of attention shifts away from the State, the Welsh School opened the door to proposals to redefine the notion of sovereignty in the new 'ecological era'. 'Ecological security' is seen as requiring a 'new cosmology' that incorporates a shift from a homo-centric to a bio-centric approach to security, on the one hand, and the reconstruction of a new identity based on '*loyalty systems for our common survival*', on the other.¹⁵¹ P. Mishe further considers that global environmental threats create the need to set up a sort of 'new social contract' based on new understanding of our relationship with the earth;¹⁵² a petition which D. Deudney views as the need to reconstruct '*many of the major institutions of industrial modernity, such as the*

¹⁴⁷ BILGIN, *supra*, at 94.

¹⁴⁸ S. DALBY, 'Threats from the South? Geopolitics, Equity and Environmental Security', in D. DEUDNEY and R. MATTHEW (eds.), *Contested Grounds, supra*, pp. 155-185. See also, K. LIFTIN, 'The Greening of Sovereignty: an Introduction', in K. LIFTIN (ed.), *The Greening of Sovereignty in World Politics*, 1998, (Cambridge, Mass.: MIT Press): '*[G]lobal ecology provides a vital site for uncovering the conceptual underpinnings and practices associated with sovereignty (...) those who conceptualise authority in terms of legitimacy and patterns of governance are more likely to find environmental practices leading to new norms of sovereignty*'. Further proposals in this sense include, P. WAPNER 'Reorienting State Sovereignty: Rights and Responsibilities in the Environmental Age', in K. LIFTIN (ed.), *The Greening of Sovereignty in World Politics*, 1999, (Cambridge, Mass.: MIT Press), pp. 275-297; and K. CONCA, 'Rethinking the Ecology-Sovereignty Debate', in R. MITCHELL (ed.), *International Environmental Politics*, 2009, (London: SAGE Editions Ltd), vol.1, pp. 255-265.

¹⁴⁹ P. MISHE, 'Security through Defending the Environment: Citizens Say Yes!', in E. BOULDING (ed.), *supra*, at 108.

¹⁵⁰ BOOTH, *Theory of World Security, supra*, at 27.

¹⁵¹ MISHE, *supra*, at 108.

¹⁵² *Ibid.* For a critique on the notion of 'environmental interdependence' see R. LIPSCHUTZ, 'The Nature of Sovereignty and the Sovereignty of Nature: Problematizing the Boundaries between the Self, Society and System', in LIFTIN (ed.), *supra*, at 132. Lipschutz considers the notion of ecological interdependence as '*descendants of earlier geopolitical discourses*' which, just as the concept of state sovereignty, '*is to no one's surprise more of a social construct than a biological and geophysical "fact"*'.

State and the nation'.¹⁵³ In other words, the interconnectedness of the global ecology leads to new understandings of the political community. This new assumption deeply challenges the traditional and the limited widening perspectives on the notion of security and potentially constitutes a radical or even revolutionary move for the discipline of international security studies given that, as explained by Michael Williams and Keith Krause, State sovereignty embodies for security studies scholars '*a coherent response to many of the central problems of political life*'.¹⁵⁴

Once the Statist framework of analysis of environmental security is superseded by the proposal of a new understanding of the political community, the question that emerges is: what would then be the new level of analysis? Considering that ecological problems '*have given rise to a new sense of place and threat*', the 'bioregion' – a region defined by ecological parameters, such as watersheds or predominant vegetation type – re-emerges as a possibly appropriate unit of analysis and invites rethinking identity in ecologically appropriate ways (including outside the State or the nation).¹⁵⁵

On the other hand, as a reaction to State-centrism and what may be considered as a lack of a prescriptive goal of traditional approaches to security, the critical approach puts at the centre of the notion of security a concrete normative objective: the fulfilment of various aspects of 'human liberation'. The core challenge of the Welsh School to traditional and other non-critical security studies thus lies in the place of the individual, reified as the sole referent of security, and the corresponding understanding of the instrumental function of security serving the achievement of the individual's higher goal: its own 'emancipation'.¹⁵⁶ Critical theories thus argue that States are means – rather than ends – of security policy; although they are often '*unreliable providers of security*', if not potential generators of insecurity rather

¹⁵³ D. DEUDNEY, 'The Mirage of Eco-War: the Weak Relationship among Global Environmental Change, National Security and Interstate Violence', in I. ROWLANDS (ed.), *Global Environmental Change and International Relations*, 1991 (London: Palgrave MacMillan), at 170.

¹⁵⁴ WILLIAMS and KRAUSE, *supra*, at xiv (Preface).

¹⁵⁵ For an explanation of the notion of 'bio-region', see M. V. MCGINNIS (ed.), *Bioregionalism*, 1998, (New York: Routledge); K. SALE, *Dwellers in the Land: the Bioregional Vision*, 1985, (San Francisco: Sierra Club Books) and J.DODGE, 'Living by Live: Some Bioregional Theory and Practice', (1981) *Coevolution Quarterly*, vol. 32, pp. 6-12 John DRYZEC explains how, as one of the branches of 'green radicalism' – the political movement that emerged in North America of the late seventies – bioregionalism departs from the cultivation of a sense of place and ultimately 'want to replace local, state and national political institutions with governments organized along bioregional lines'. See J. DRYZEC, *The Politics of the Earth: Environmental Discourses*, 2005, 2nd ed.), (Oxford: Oxford University Press), at 188.

¹⁵⁶ See P. BILGIN, *supra*, at 92. The initiation and coining of the term 'critical security studies' comes from the seminal article of K. BOOTH, 'Security and Emancipation', (1991) *Review of International Studies*, vol. 17, issue 4, pp. 313-326. Afterwards, what distinguished the Welsh School from other branches of critical security studies was its influence on the Gramscian and Frankfurt School tradition of 'critical theory'.

than stability and prosperity.¹⁵⁷ The positive obligation of the State with regard to security (security provider), and its negative obligation (not creator of insecurity), are both denied, and this '*pessimistic view of global security*' is all the more emphasized that individuals' insecurity is considered to be exacerbated by the existing free-market economic structure.¹⁵⁸ After putting the individual at the centre of the security analysis, the critical security school counterbalances its previous 'pessimistic' view on global security by creating the notion of emancipation, defined by Booth as '*the freeing of people – as individuals and groups – from those physical human constraints which stop them carrying out what they would freely choose to do*'.¹⁵⁹

Moreover, this critical anthropocentric approach to security is closely related to the emergence of the human security branch of international security studies, which emergence mirrored the introduction of the notion of human security in United Nations institutions as well as in the policy agenda of some countries that eventually formed the 'Human Security Network'. As explained by Barbara Von Tigerstrom, the launch of the notion of human security '*is based on the argument that, because of its privileged moral position, individual human beings rather than States should be the primary referent objects of security*'.¹⁶⁰ The relationship (not comparison) between human security and environmental security can thus be said to be ambivalent. Firstly, both concepts are part of a wider movement of expansion and deepening –

¹⁵⁷ BUZAN and HANSEN, *supra*, at 216.

¹⁵⁸ *Ibid.*

¹⁵⁹ BOOTH, 'Security and Emancipation', *supra*, at 319. Besides, emancipation is defined in practical terms which highly resemble the definition of 'positive peace' advanced by the prominent peace researcher Johan Galtung – namely, emancipation or positive peace as absence of poverty, of fear and hunger, in GALTUNG, *supra*.

¹⁶⁰ The introduction into the UN agenda of the human-centered approach came with the Human Development Report of 1993 elaborated by the United Nations Development Programme. The Report defined human security as '*one of the five pillars of a people-centered world order*' and pushed forward the use of the concept in the international discourse with the overall purpose for the UN system of maintaining international peace and security, and with the aim of reinforcing the impetus from military to development spending. Henceforth, clearly echoing the human-centered approach to security, the Report recognized that: '*The concept of security must change, from one focused on nations, arms and territory to a greater concern with people, human development, food, employment and the environment*', and expressly uses the term 'environmental security', and considered in this context that: '*[H]uman Security can be threatened in any of seven different areas, including threats to environmental security. Such threats include: degradation of local eco-systems, water scarcity, lack of sanitation, desertification, severe air pollution, nuclear or chemical accidents and natural disasters (...) Threats to one dimension of Human Security often spread to others and many threats cross national borders.*' United Nations Development Programme, Human Development Report 1993, (New York: Oxford University Press), at 2. Just as the critical theorists, proponents of the notion of human security mainly argue against the assumption that security is a negative force, instead of a condition under which Human Rights can flourish, see B. VON TIGERSTROM, *Human Security and International Law: Prospects and Problems*, 2007 (Oxford and Portland, Ore.: Hart Publishing), at 51. See also R. KHERAD (ed.), *La sécurité humaine: théorie(s) et pratique(s)*, 2010 (Paris: Pedone).

sometimes deconstruction or redefinition – of the classical realist understanding of security. Their emergence and consolidation came with the emergence of new ‘big questions’, since, as Eric Stern states, *‘the trend toward disassociating security and the nation State and attempts to enhance security for individuals entails coping with serious tensions among multiple levels of social aggregation and identity’*.¹⁶¹ Therefore, the relation between both concepts could be understood from two different angles: either including in human security an environmental component; or, alternatively, introducing a people-centred (as opposed to a State-centred) dimension to environmental security’ – which is now exacerbated by the increase in the number of displaced people due to climate change.

4.2. Innovative Empirical Research: The Quest for the Environmental Causes of Conflict

4.2.1. Spread of Empirical Studies: A Euro-Atlantic Movement

The end of the Cold War not only brought about an institutional break within international security studies between ‘cold war traditionalists’ and the new schools of the widening-deepening movement; it also generated grant-making reorientation, for, as Mitchel Wallerstein explains, *‘many donors at the time chose to turn their attention instead to environmental problems, where the prospects for progress looked considerably better’*.¹⁶² In other words, the incorporation of environmental issues into the realm of security policy was in part a strategy seeking to control or limit the loss of financial support in the aftermath of the Cold War. A good example of this plan can be found in, for instance, the United States of America, as the chairman of the U.S. Senate Armed Services Committee, Senator Sam Nunn, proposed that substantial Defense Department and intelligence resources be reoriented to the solution of ecological problems through the creation of a Strategic Environmental Research Program. Journalist Philip Shabecoff of the International Herald Tribune interpreted this proposal as an attempt by Senator Nunn to combine environmental concerns with the interest of the defence and military establishment of the United States of America, so that research and technological capacity for the military could be maintained *‘at a time when military*

¹⁶¹ E. STERN, ‘The Case for Comprehensive Security, in D. DEUDNEY and R. MATHEWS (eds.), *supra*, at 145.

¹⁶² M. B. WALLERSTEIN, ‘Whither the Role of Private Foundations in Support of International Security Policy?’, (spring 2002) *The Nonproliferation Review*, vol.9, issue 1, pp. 83-92, at 86.

budgets will be shrinking substantially due to changing international threat perceptions after the demise of east-west conflict'.¹⁶³

The move proved to be successful and, for the first time, in 1991, the concept of 'environmental security' was integrated into the U.S. National Security Strategy, followed by a widely commented speech of Secretary of State Warren Christopher in which he stated that '*environmental initiatives can be important, low-cost, high-impact tools in promoting our national security interests*'.¹⁶⁴ President Clinton pursued this initiative and issued several statements embracing environmental problems as security concerns, and government offices were created, such as the Global Environmental Affairs Directorate at the National Security Council, a Department of Defense Office for Environmental Security, and an Office of Under Secretary of State for Global Affairs; Deputy Benjamin Gilman even filed a proposal for a Bill to establish the National Committee on the Environment and National Security.¹⁶⁵

One of the most significant consequences of the change in policy funding – and associated with this new official institutional mushrooming – was the spread of research projects in North American (both the USA and Canada) and European centres on the relationship between environmental degradation and the outbreak of (national and international) violent conflict. This spread was initiated with the launch of the Environmental Change and Security Program (ECSP) at the Woodrow Wilson Center in Washington D.C. – a highly recognized think-tank founded in 1968 and ranked among the top fifteen in the world. The first biannual reports of this Program, lead by its directors, Geoffrey D. Dalbeko and David D. Dalbeko, focussed on setting the theoretical basis of the Program and located its objectives

¹⁶³ P. SHABECOFF, 'International Herald Tribune, 30 June–1 July 1990, cited in L. BROCK, 'Peace through Parks: The Environment on the Peace Research Agenda', (November 1991) *Journal of Peace Research*, vol.28, issue 4, pp. 407-423, at 419.

¹⁶⁴ W. CHRISTOPHER, *In the Stream of History: Shaping Foreign Policy for a New Era*, 1998, (Stanford, Calif.: Stanford University Press), at 417. For a detailed explanation, see R. MATTHEW, 'Environmental Security and US Policy', in S. KAMIENIECKI and M. KRAFT, *The Oxford Handbook of US Environmental Policy*, 2013, (Oxford: Oxford University Press); also, by the same author, 'Integrating Environmental Factors into Conventional Security', in LOWIE and SHAW (eds.), *supra*, pp. 33-48, at 33. See also by the same author, R. MATTHEW, 'Rethinking Environmental Security', in N. P. GLEDITSCH (ed.), *Conflict and the Environment*, 1997, (Dordrecht, Boston, London: Kluwer Academic Publishers), pp. 71-91; and with T. GAULIN and B. McDONALD, 'The Elusive Quest: Linking Environmental Change and Conflict', (September/Septembre 2003) *Canadian Journal of Political Sciences/Revue Canadienne de Science Politique*, vol. 36, issue 4, pp. 857-878.

¹⁶⁵ Bill H.R. 575, proposed by Benjamin Gilman in the U.S. House of Representatives, 'To Establish the National Committee on the Environment and National Security', 103rd Congress, 1st Session 26 January 1993.

within the doctrinal and policy debate on whether the notion of security should be redefined in the post-Cold War era so as to incorporate new environmentally related factors.¹⁶⁶

Then, a progressive use of case-study methodology applied to the issue ensued; and reports have been adapted ever since to the respective political and scientific evolutions until today. Following the Wilson Center groundbreaking initiation, the University of Toronto launched the first programme, funded by the American Academy of Arts and Sciences in Cambridge (Massachusetts) and soon referred to as the 'Toronto Group' or by the name of its director, Thomas Homer-Dixon – on environmental scarcity and conflict – with a clear ambition to apply empirically based methodology.¹⁶⁷ A very similar initiative was developed on the other side of the Atlantic, as the Swiss Peace Federation supported the Environment and Conflicts Project (ENCOP), launched at the Centre for Security Studies (CCS) in Zurich, at the time directed by Gunther Baechler. Ever since its creation in 1990, the ENCOP was known as the other major collaborative research project investigating the links between environmental damage and degradation and actual or possible conflicts. Among the several reports that emerged out of this project, S. Libiszewski's article 'What is an Environmental Conflict' is considered as having set a landmark.¹⁶⁸ The results of the research indicated that environmental degradation is unlikely to determine – or lead directly to – interstate wars or other large-scale conflicts, though such degradation is considered as a destabilizing factor which potentially jeopardizes the peaceful future of either in very resource-poor countries or even in more developed countries.

¹⁶⁶ The Woodrow Wilson Center for International Scholars, see official website at: <<http://www.wilsoncenter.org/>> Within the Environmental Change and Security Project, the Center released regular reports. The first report was more theoretically based than the subsequent evolution of the project, and contained G. DALBEKO and D. DALBEKO, 'Environmental Security: Issues of Conflict and Redefinition'; followed by R. MATTHEWS, 'Environmental Security: Demystifying the Concept, Clarifying the Stakes', and M. LEVY, 'Time for a Third Wave of Environment and Security Scholarship? – A Commentary'. All reports can be found at: <<http://www.wilsoncenter.org/program-publications/Environmental%20Change%20and%20Security%20Program?page>>.

¹⁶⁷ T. HOMER-DIXON, 'On the Threshold: Environmental Changes as Causes of Acute Conflict', (Autumn 1991) *International Security*, vol. 16, issue 2, pp. 76-116; followed by T. HOMER-DIXON, J. BOUTWELL and G. RATHJENS, 'Environmental Change and Violent Conflict', (February 1993) *Scientific American*, vol. 268, issue 2, pp. 38-45; and T. HOMER-DIXON, 'Environmental Scarcities and Violent Conflict: Evidence from Cases', (winter 1994) *International Security*, vol. 19, issue 1, pp. 5-40. The final results were compiled and jointly published in T. HOMER-DIXON, *Environment, Scarcity and Violence*, 2001, (Princeton, N.J.: Princeton University Press).

¹⁶⁸ S. LIBISZEWSKI, 'What is an Environmental Conflict?', (July 1992) Occasional Paper N° 1, (Bern: Swiss Peace Foundation, and Zurich: Center for Security Studies and Conflict Research), Swiss Federal Institute of Technology. All publications as well as additional information on ENCOP can be found at: <<http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?lng=en&id=235>>.

4.2.2. *Opposing Voices: Ontological and Epistemological Critiques*

When confronted with the data found in Homer-Dixon's first publication in 1995, opponents of the empirical research on the environmental causes of conflict first criticized the methodological weaknesses of the research undertaken. Mark Levy stressed the empirical uncertainty of the 'environment–security link', and more generally questioned the possibility to undertake empirical research on the causes of conflict at all.¹⁶⁹ In doing so, he highlighted the difficulty of avoiding '*double counting*' the threats under study, for in his view, '*if one dissects the precise links that are alleged between environmental degradation and national security, for any environmental threat to be a threat it must be demonstrable a connection to some vital national interest and that these connections justify certain remedial measures*'.¹⁷⁰

Similarly, D. Deudney's critique enumerated four reasons not to take the results of the Toronto Group very much into account: first, he considered that Homer-Dixon's statistics were unreliable, as they lacked the historical support necessary to assess the accuracy of his conclusions; second, he criticized the limited scope of the research sample, which in his view led the team to disregard how environmental scarcity may actually stimulate co-operation, as neoliberal institutionalism holds; and third, he deplored the lack of complex-causes analysis, involving an overall system in which the prospects of conflict and violence would be integrated.¹⁷¹ This last point raised by Deudney was actually openly supported by Levy, who engaged in an open confrontation with Homer-Dixon through a journal correspondence.¹⁷² Yet,

¹⁶⁹ M. LEVY, 'Is the Environment a National Security Issue?', (autumn 1995) *International Security*, vol. 20, issue 2, pp. 35-63, at 37, who states that: '*we do not know much about the role of environment in causing conflict because we do not know much about what causes regional conflict overall. What we need if we wish to come to grips with any coming anarchy, is research on conflict, not on the environment*'.

¹⁷⁰ M. LEVY and T. HOMER-DIXON, 'Correspondence: Environment and Security', (winter 1995–1996) *International Security*, vol. 20, issue 3, pp. 189-198. A similar inter-disciplinary debate started off since the publication of N. P. GLEDITSCH, 'Armed Conflict and the Environment: a Critique on the Literature', (May 1998) *Journal of Peace Research*, vol. 35, issue 3 pp. 381-400. His objections were replied to jointly by D. SCHWARTZ, T. DELIGIANNIS and T. HOMER-DIXON, 'The Environment and Violent Conflict: A Response to Gleditsch's Critique and Some Suggestions for Further Research', in (summer 2000) *Environmental Change and Security Project Report*, issue 6, pp. 76-106.

¹⁷¹ D. DEUDNEY, '*Environmental Security: a Critique*', *supra*, chapter 8. See also from the same author on the same lines, D. DEUDNEY, 'The Case against Linking Environmental Degradation and National Security', (winter 1991) *Millennium*, vol. 19, issue 3 pp. 461-476; and D. DEUDNEY, 'Geopolitics and Change', in M. W. DOYLE and G. J. IKENBERRY (eds.), *New Thinking in International Relations Theory*, 1997, (Boulder, Colo.: Westview Press), pp. 91-123.

¹⁷² Nonetheless, Levy's opposition of principle to the link does not impair his opinion that action on climate change requires a policy-making style more akin to a defence policy than to an environmental policy: '*Climate change is a problem much more like the problem of containing the Soviet Union: it*

behind the veil of criticism based on lack of scientific certainty, the opposing voices hold in fact a much better grounded resistance to the very notion of environmental security, related to the deficient structural inconsistencies of the concept as well as to the possible pervasive effects of expanding the realm of security policy.

Opponents concerned with the structural deficiency of the notion of environmental security generally do not deny that vulnerability to conflict arising from environmental stress can be, to a certain extent, possible or real. Rather than denying the potential triggering or worsening effect of environmental degradation in armed conflicts, their core arguments focus on the unsuitability of the notion to undergo thorough conceptualization. Lothar Brock, who excelled as one of the main proponents of the 'existential link', arguing that environmental depletion arising from industrialization ought to be considered as a form of aggression, acknowledged however that the use of the term 'environmental security' would be a contradiction in itself, since the nature of ecological thinking is *'dynamic and global, whereas security thinking is static and particularistic'*.¹⁷³ Hence, he suggested overcoming such a notion *'by redefining security to make it conducive to ecological thinking'*, although no further developments on the suggested 'redefinition' were proposed. Levy spotted Brock's point and replied that proponents of the existential link between environmental depletion and interstate conflict are precisely the ones providing the loosest definitions of security, so that the *'mistaken impression that any problem that is international and ecological is a security problem'* is actually (ironically) encouraged.¹⁷⁴ On this point, Deudney further considered that the expansive move would eventually harm the notion of security in so far as *'the rising fashion of linking them to risks creating a conceptual muddle rather than a paradigm of world new shift: a de-definition rather than a re-definition of security'*.¹⁷⁵ He also warns against *'the dangers of green semantics'*, considering that the rise of the environmentalist movement in the United States (partly with the pacifist movement) would *'redirect social energies now*

requires a grand strategy to guide actions in the face of distant, uncertain threats, and an overarching commitment from high levels to leadership', LEVY, *supra*, at 54. .

¹⁷³ L. BROCK, 'Security through Defending the Environment: an Illusion?' in E. BOULDING (ed.), *supra*, pp. 79-102, at 94. Also supported by R. LIPSCHUTZ, 'Environmental Conflict and Environmental Determinism: The Relative Importance of Social and Natural Factors', in N. P. GLEDITSCH (ed.), *supra*, pp.35-51; and 'The Nature of Sovereignty and the Sovereignty of Nature: Problematising the Boundaries between the Self, Society, State and System', in K. T. LIFTIN (ed.), *The Greening of Sovereignty in World Politics*, 1998, (Cambridge, Mass.: MIT Press), pp. 109-138.

¹⁷⁴ LEVY, 'Is the Environment a National Security Issue?', *supra*, at 45.

¹⁷⁵ DEUDNEY, 'The Mirage of Eco-war: the Weak Relationship among Global Environmental Change, National Security and Interstate Violence', *supra*, at 175.

devoted to war and interstate violence toward environmental amelioration'.¹⁷⁶ Michael Myers nonetheless diluted such far-reaching negative effects by considering that the problem is not so much in the notion's alleged structural deficiency, but in the capacity of those called to interpret it.¹⁷⁷

To be sure, the key to overcome this rather infertile debate on the pro's and con's of rethinking the traditional focus of national security and the eventual scientific basis for its acceptance or rejection lies in the normative and political endeavour of the scholars involved in it. It is the second range of criticisms that tackles the real heart of this debate when dealing with the political and social effects that the appraisal of an extended notion of security with respect to environmental considerations potentially entails. As John Dryzek defined it, this expansive move is nothing but the manifestation of a new discourse or a new '*shared way of apprehending the world*'.¹⁷⁸ Simon Dalby thereby locates the expanding move in the specific geopolitical framework of analysis in which it is inserted and specifically contends that '*[t]he term "environmental security" has become part of a framework for advocating new conceptions of how the international political order should be understood and what normative aspirations are appropriation in the post-Cold War era*'.¹⁷⁹ The '*non-progressive*' reading of the possible use of environmental security as a political discourse highlighted the fact that acknowledgement of the notion of 'environmental security' provided American foreign policy with a new tool to maintain the global and political status quo or even expand the USA's hegemonic position, as the underlying goal of the concept (previously formulated by Senator Nunn) squarely fits a U.S. ambition to become the 'global manager'.¹⁸⁰ Absorbed by a

¹⁷⁶ DEUDNEY, 'Environmental Security: a Critique', *supra*, at 195.

¹⁷⁷ See M. MYERS, 'Environment and Security', (spring 1989) *Foreign Policy*, vol. 74, pp. 23-41, at 39: '*the difficulty of perceiving connections between the environment and instability may say less about the nature of the connections than about the limited capacity of policymakers to think methodically about matters that have long lain outside their purview*'.

¹⁷⁸ DRYZEK, *The Politics of the Earth*, *supra*, at 9: '*[d]iscourses construct meanings, and relationships. [E]ach discourse rests on assumptions, judgments, and contentions that provide the basic terms for analysis, debates, agreements and disagreements*'.

¹⁷⁹ Dalby's realistic clarification invites us to recall the above-mentioned 1952 seminal article of Arnold Wolfers, describing national security as an ambiguous symbol with little intrinsic meaning and yet capable of subordinating all other interests to those of the nation.

¹⁸⁰ S. DALBY, 'Threats from the South? Geopolitics, Equity and Environmental Security', *supra*. See also, from the same author, 'Geopolitics and Ecology: Rethinking the Contexts of Environmental Security', in M. LOWI (ed.) *Environment and Security: Discourses and Practice*, *supra*, pp.84-100, and Dalby's book *Environmental Security*, 2002, (Minneapolis, Minn.: University of Minnesota Press). It is certain that environmental security as a notion emerged in Anglo-American security thinking, with the danger that ethnocentric and geopolitical assumptions this entails, since, as DALBY explains, security thinking is only partly an academic discourse, it is most importantly part of the process of international politics and the formation of American foreign policy in particular'.

hegemonic geopolitical strategy, environmental security helped fill the gap of the 'missing enemy' after the end of the Cold War. Some authors thus warned against its effects, both in the national and international spheres of State action. In its internal face, environmental security could lead to a policy of '*eco-totalitarianism*', understood as the assumption by the State of total control, since 'all activities virtually affect the environment'; while in its international dimension, the plea in favour of or the protection of the environment (thereafter associated with – if not directly labelled as – a security issue) are the seeds of eco-imperialism.¹⁸¹ Besides, on the other hand, opponents consider that upholding an environmental security notion may become an obstacle to environmental co-operation, since the national security discourse automatically leads to a greater concern for State sovereign prerogatives, virtually leaving out of the basket topics that could have been made the object of international co-operation. There is therefore in this later objection the idea that environmental security also creates an issue regarding the areas of competence of international regulation and jurisdiction.

5. CONCLUSIONS

Security is a contested notion. The different forms and accounts of its evolving meaning are inherently bound to the overall historical and spatial framework in which they emerge. As a context-specific concept, it requires first of all identifying the actors involved in the configuration of a specific evolution of its understanding (both in the national and international realms); as an instrumental concept, it demands unveiling the underlying interests of its promoters, mapping the strategies of introduction, circulation and possible imposition of a new understanding of security in a relevant arena and, ultimately, disentangling as much as possible the ultimate policy or normative purpose of such a move.

¹⁸¹ The latter point undoubtedly meets the 'Southern critique' to international environmental law, a specialized regime which was initially perceived with skepticism by recently de-colonized States, as the protection of the global environment could possibly be a new weapon of 'Northern States' to control 'Southern States' economic development in the post-colonial era. Thus, developing states did not adhere to the normative development of IEL until 'sustainable development' was clearly established and, once on the road, developing countries perceived environmental security with skepticism, since thinking of environmental matters in terms of 'global security' obscures the equity questions essential in Multilateral Environmental Agreements and any sense of historic responsibility. Marvin Soroos described as follows: '*the traditional self-defense focus on security thinking needs to be replaced by a cooperative and preventative approach. Security not much understood in terms of force but more of the construction of community and practice of mutual cooperation*', in M. SOROOS, 'Global Change, Environmental Security and the Prisoner's Dilemma', (1994) *Journal of Peace Research*, vol. 31, issue 3, pp. 317-332, at 322.

The present chapter has given an account of the range of factors forming the framework in which the approximation to environmental issues from a security standpoint – or, vice versa, the introduction of environmental considerations into the notion of security – was effected. What primarily characterizes this move is that it was a product of both the Cold War powers (the United States of America and the Soviet Union). Each initiated this expansive move of the notion of security for different reasons and purposes, within different arenas and at different times.

Whereas the first calls for redefining and ‘greening’ security sounded in American doctrinal circles closely related to the governmental foreign affairs and defence agencies, in reaction to a rising concern over ‘resource wars’ since 1973, the notion of ‘international environmental security’ emerged from the opposing Soviet bloc (driven by the Soviet Union and supported by some closely allied communist States, such as Czechoslovakia). The combined product of two manifestations of the Soviet ‘New Thinking’ promoted by Gorbachev in the mid-1980s – namely, a newly discovered Soviet national environmentalism and the reification of international law – the term ‘international environmental security’ was coined and emerged as one of the conceptual vehicles of the fundamental change of strategy advanced by the Soviet Union before the United Nations. There, the notion was presented under an ambivalent blueprint, as much as an engine of international environmental co-operation as of international disarmament co-operation. Unsurprisingly, in spite of the national doctrinal move that had previously shown an incipient openness towards expanding the scope of security to non-military issues (including environmental ones), the United States of America fiercely opposed the policy-based and conceptual Soviet innovation put before UN organs. This rejection was nonetheless more a preventive and defensive reaction against the wider Soviet attempt to launch a new debate on the system of international peace and security, than against the notion of international environmental security as such.

Thus, the disintegration of the Soviet Union produced a double-edged effect. On the one hand, the Soviet account of ‘international environmental security’ put before UN organs dissolved; only the positive dimension – which called for the development of international environmental co-operation – was followed up, although no reference to the concept remained. On the other hand, proving to be a useful compensation tool for the lack of an ‘enemy syndrome’, the notion of environmental security was re-embraced by American governmental agencies. Important conceptual innovations in the notion of security and its relation to the environment mushroomed amongst the schools of international security

studies, and an important funding reorientation gave rise to the first empirical attempts to link environmental degradation or stress and violent conflict.

Today, the latter theoretical and empirical accounts of the relation between the environmental and the security spheres developed outside the United Nations system remain active, and have come to coincide with the emergence of the Climate Change and International Security Discourse. While this narrative can be chronologically considered as a 'second wave' of the move linking the environmental and security spheres, it was launched by a set of actors different from the 'international environmental security' precedent, responded to different issues and interests and took place within a post-Cold War setting, and counts with its own specific range of empirical research. Chapters 2 and 3 are therefore devoted to the reconstruction of all the concrete components of this Discourse.

CHAPTER 2

MAPPING THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE: CONSTRUCTION AND CIRCULATION IN REGIONAL ORGANIZATIONS

1. INTRODUCTION

2. CONSTRUCTION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE IN HEGEMONIC REGIONS: A PRODUCT OF GEO-POLITICAL CONCERNS

2.1. Launch of the Discourse: Its Institutionalization in the European Union (EU)

2.1.1. German Origins: Early Formulations of the Climate Change and International Security Discourse at a National Level

2.1.2. European Cradle: Mainstreaming the Climate Change and International Security Discourse across the EU and EU Member States' Policies

2.2. Consolidation of the Discourse: Its Extension to the Organization of Security and Co-operation in Europe (OSCE) and the North Atlantic Treaty Organization (NATO)

2.2.1. Informal Transatlantic Extension: Exchanging Information with the Parallel U.S. Approaches to Climate Change and International Security

2.2.2. Formal Transatlantic Extension: Intertwined Introduction of the Climate Change and International Security Discourse into the Agendas of Two Regional Security Organizations (OSCE and NATO)

3. CIRCULATION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO THE MOST VULNERABLE REGIONS: IN SEARCH OF A LEGITIMIZING PARTNER

3.1. Introduction of the Discourse into the Agenda of the Pacific Islands Forum: Securitization of the Predominant Developmental Approach to Climate Change

3.1.1. Shifting Oceans: Indian vs. Pacific Island States as Loci of Reception of the Climate Change and International Security Discourse

3.1.2. Forging Ties: Reinvigorated Political Partnership and Innovative Financial Assistance for Climate-Change Adaptation as Vehicles of Implementation of the Climate Change and International Security Discourse

3.2. Introduction of the Discourse into the Agenda of the African Union: Diversification of the Sectors of Inter-Regional Co-operation

3.2.1. Reminiscing 'Green Ghosts': African Scenarios of Environmental Stress and Conflict as Natural Loci of Reception of the Climate Change and International Security Discourse

3.2.2. Developing Ties: Innovative Inter-Regional Co-operative Framework for Renewable Energy as a Vehicle of the Climate Change and International Security Discourse

4. RESTRAINED ACCESS OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO EMERGING REGIONS: BETWEEN DISINTEREST AND RELUCTANCE

4.1. Treatment of the Climate Change and International Security Discourse in Asia: A Distant Look

4.1.1. Small Benches: Lack of an Appropriate Forum for Reception of the Climate Change and International Security Discourse

4.1.2. Unfruitful Attempts: The Disinterest in Incorporating the Climate Change and International Security Discourse into the Agendas of the Association of South East Asian Nations (ASEAN) and the Shanghai Co-operation Organization (SCO)

4.2. Treatment of the Climate Change and International Security Discourse in Latin America and the Caribbean: A Reluctant Approach

4.2.1. Reluctance in Inter-American North-South Co-operation: Heterogeneity of the Receptor Fora (OAS, CARICOM)

4.2.2. Reluctance in Latin American South-South Co-operation: Competing Economic Interests and Ideological Divides (MERCOSUR, UNASUR, ALBA)

5. CONCLUSIONS

'Critical security-relevant knowledge about climate change has come from the partnership between environmental scientists and the defense and intelligence communities. That partnership, vibrant in the 1990's, should be revived.'

Center for Naval Analysis (CNA), 2007

'In the next decades, climate change will drive as significant a change in the strategic security environment as the end of the Cold War.'

Nick Mabey, 2008

1. INTRODUCTION

Ever since the linkage between the security and environmental spheres was introduced for the first time in the United Nations system, the international arena has undergone profound and radical transformations. As noted in the previous chapter, the major geopolitical change brought about by the disintegration of the Soviet Union had a double-edged effect on this recently discovered 'link'. While most initiatives in UN organs and institutions concerning environmental issues from a negative security standpoint remained virtually frozen for twenty years, the positive dimension of international environmental security moved notably forward since the celebration of the UN Conference on Environment and Development. Global environmental co-operation thus entered a new and most prolific phase of development in complex and broad areas – climate change, desertification, biodiversity protection – and the notion of sustainable development was finally solidly established as the underlying basis and framework of international co-operation in such areas.¹⁸²

Co-operation in the field of climate change initially focused on establishing the scientific information necessary to promote the international community's recognition of the existence of the phenomenon and of the predictability of its effects, a task which was endorsed by the Intergovernmental Panel on Climate Change since its creation jointly by UNEP and WMO in 1988. As the evolution of the IPCC Assessment Reports indicates, the focus of the work of the IPCC has progressively paid greater attention to the economic and financial consequences of both the phenomenon of climate change and the measures taken by the international community to halt it. More recently, as the negotiations on the second commitment period of the international regime on climate change remain pending, the IPCC is concentrating on the adverse impacts of climate change, as evidenced by the 2007 IPCC 4th

¹⁸² The most notable exception to this general paralysis included the increased awareness of the need to secure appropriate and sustainable environmental conditions for socio-economic programmes of development taken into account by the Security Council soon after the disintegration of the Soviet Union.

Assessment Report,¹⁸³ which introduced a region-based approach mapping the causes and multiple manifestations of vulnerability to the adverse effects of climate change and, more recently, by the publication of the Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation.¹⁸⁴ Both documents firmly indicate that increased steps in international climate change co-operation focused on adaptation – rather than mitigation – measures will be needed.

As attention to the adverse impacts of climate change increases, along with the correlative scepticism on the possibility to reach an effective political compromise for the period post-2012, climate change has caught the attention of security and intelligence communities. The linkage between the environment and security spheres that Gorbachev advanced in 1987 under the heading of ‘international ecological security’ is back to the front line, a ‘revival’ spreading nowadays within the specific context of climate change. This chapter is therefore devoted to the reconstruction of the political process by which climate change was progressively construed as a security issue. Where did the ‘Climate Change and International Security Discourse’ emerge and how did it reach a consolidated position on the international agenda?

The political process leading to the construction of the Climate Change and International Security Discourse originally translated the will of its promoters to foresee the world-scale geo-political transformations that climate change impacts may generate, such as the determination of the future balance of power among the major powers and the modification of their respective regional and global share of influence. From this standpoint, it shows how, after its configuration by national governmental security and defence agencies of one European Union Member State, the discourse was successively institutionalized and integrated into the agenda of the European Union; then consolidated in regional organizations of which the European Union (EU) is a member; and finally circulated to other regional organizations in regions beyond the scope of the EU. This chapter also highlights the fundamental role played throughout this process by a newly born climate change and

¹⁸³ IPCC, R. K. PACHAURI and A. REISINGER (eds.), *Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 2007, (Geneva: IPCC), 104 pp.

¹⁸⁴ IPCC, C. B. FIELD., V. BARRO, T. F. STOCKER, D. QIN, D. J. DOKKEN, K. L. EBI, M. D. MASTRANDREA, K. J. MARCH, G.-K. PLATTNER, S. K. ALLEN, M. TIGNOR, P. M. MIDGLEY (eds.), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*, Special Report, 2012 (Cambridge, UK: Cambridge University Press), 582 pp.

international security research community operating in parallel to the IPCC 'mainstream climate knowledge'.¹⁸⁵

When embarking on this reconstructive effort, the region becomes the primary level of analysis of the Climate Change and International Security Discourse. The main reason for this is that it constitutes a sufficiently wide geographical extent where the main trends in climate variation can become visible. Besides, as the idea of a 'common fate' of the region – roughly exposed to the same forms or manifestations of adverse climate change impacts – can be nurtured, the relative narrowness in scope of this level of analysis also facilitates the construction and identification of a common regional position with respect to the Climate Change and International Security Discourse. Henceforth, this chapter differentiates three main relevant regions for the Climate Change and International Security Discourse: (1) hegemonic regions (proponents of the Discourse); (2) most vulnerable regions (receptors of the Discourse); and (3) emerging regions (alien to the Discourse).¹⁸⁶

¹⁸⁵ Such a community may be considered as a new sort of 'epistemic community' (operating outside the realm of natural science), defined by Peter Haas as a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Haas further points out that, although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have: '(1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity, that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (4) a common policy enterprise, that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence', in P. HAAS, 'Introduction: Epistemic Communities and International Policy Co-ordination', (1992) *International Organization*, vol. 46, nº 1, pp. 285-319, at 3.

¹⁸⁶ Such a tripartite division is not intended to represent an exhaustive nor a precise description of the current state of international politics. It has been drawn merely for the purpose of explaining the dynamics of the birth and exportation of the Climate Change and International Security Discourse and has thus been adjusted to what the Discourse required. Therefore, the term 'hegemonic regions' (1) refers to the site of birth of the Discourse (the European Union) and its extension to the OSCE and NATO, despite the fact that some Member States of these organizations are not OECD countries, nor even necessarily developed countries listed under Annex I of the UNFCCC. The location of the OSCE and NATO in this category stems from the fact that the EU is a member of such organizations and thus directly leads the extension of the Discourse in these areas. Similarly, the category of 'the most vulnerable regions' (2) covers regions with different types of vulnerability (the existential threat of Pacific Island States vs. the threat to human security for African countries), in so far as they are united by the fact that they served as loci of reception of the Climate Change and International Security Discourse. Correlatively, regions that could have fallen within such a category, since they are also vulnerable (e.g. Caribbean Island States), have been excluded from it because they remain alien to the Discourse. Finally, the category of 'emerging regions' (3) encompasses wide areas between the first two categories, including four out of five members of the BRICs group – Brazil, Russia, India and China – but excluding South Africa because, as a member of the African Union, it falls exceptionally within the category of 'most vulnerable regions'.

In each of these regions, different aspects of the Climate Change and International Security Discourse may be deepened and developed into new forms or simply rejected, depending on the underlying interests and priorities of the main driver State(s). The 'securitization move' then operates through the introduction of the security approach to climate change into the agendas of international organizations of regional geographical scope. Although this mechanism of 'intra-regional consolidation' is common to all regions concerned, the nature and level of integration of the regional organizations involved and studied in this chapter are heterogeneous. Most of the organizations referred to have primarily security and defence mandates – the Organization for Security and Co-operation in Europe (OSCE), the North Atlantic Treaty Organization (NATO), the African Union (AU) and the Shanghai Co-operation Organization (SCO) – yet other organizations, such as the Pacific Islands Forum, the *Mercado Común del Sur* (MERCOSUR), the *Alianza Bolivariana para los Pueblos de Nuestra América* (ALBA), the Caribbean Community (CARICOM) and the Association of South East Asian Nations (ASEAN), were mainly conceived as regional frameworks for economic co-operation. In addition, the regional organizations studied do not represent sharp geographical delimitations, as two or more organizations operating within the same 'climate change and international security region' – such as the EU, the OSCE, and NATO – have partly overlapping geographical scopes. Despite the fact that the region constitutes the appropriate level of analysis to study the birth of the Climate Change and International Security Discourse and the basis of its consolidation in the international agenda, it is important to note that it had a 'global outreach', given that it was integrated into the agendas of the two core organs of the United Nations. Both the regional and global processes are intertwined and exist simultaneously in both levels of analysis, animating a cross-fertilization of the arguments as well as a constant inter-level back-and-forth circulation of the Climate Change and International Security Discourse.¹⁸⁷ Yet, for clarity and deeper analysis purposes, the global level of circulation of the Discourse will be dealt with separately in Chapter 3.

Each section of the present Chapter is devoted to the role played by the three previously mentioned categories in the configuration of the Climate Change and International

¹⁸⁷ See L. GRADONI and H. RUIZ FABRI, *La circulation des concepts juridiques : le Droit international de l'environnement*, 2009, (Paris: Société de Législation Comparée). These scholars used the notion of circulation to explain how globalization (or, more precisely '*la mondialisation*') may be understood as a process in which *legal concepts* are diffused in different normative spaces or 'regimes'. Borrowed from the work of Gradoni and Ruiz Fabri, the idea of 'circulation' is yet used in this thesis to depict the diffusion of a political construct rather than a legal concept. Circulation is thus understood in simple terms as the transfer of the Climate Change and International Security Discourse from the EU, the OSCE and NATO to other regional organizations.

Security Discourse. Section 2 traces the origins of the Discourse in hegemonic regions (EU, OSCE and NATO) concerned with the geo-political impacts of climate change on their absolute and relative power, which triggered the beginning of the involvement of the security and intelligence communities of EU Member States and the USA with climate change. Section 3 shows how this initial transatlantic move was circulated to the most vulnerable regions (Pacific Island States and most African countries) as potential legitimizing partners of the promoters of the Discourse. Finally, Section 4 is devoted to the position of emerging regions where the impacts of climate change are not tantamount to existential threats, and access to the Climate Change and International Security Discourse is constrained.

2. CONSTRUCTION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE IN HEGEMONIC REGIONS: A PRODUCT OF GEO-POLITICAL CONCERNS

2.1. Launch of the Discourse: its Institutionalization in the European Union

2.1.1. German Origins: Early Formulations of the Climate Change and International Security Discourse at a National Level

The study of the Climate Change and International Security Discourse must first of all focus on the configuration of this alternative approach to the phenomenon as a policy of the European Union (EU). Although nowadays the Discourse is generally associated with the desperate plea of the most vulnerable countries, such as small-island developing States threatened by sea-level rise, the region of origin and cradle of the Climate Change and International Security Discourse is in fact located in the European continent. Ever since what is known as the 'EU Process of Climate Change and International Security' (hereafter, the EU Process) was officially launched in 2007, the EU has played a fundamental role as a leading political force promoting the development of this approach to climate change in several international fora – including, but not limited to, United Nations organs. Yet, the European concern about the effects of climate change impacts on international security, as crystallized in the launch of the EU Process, would not have seen the light without the prior political input of the German government.

Germany started to address climate change through a security prism soon after the adoption of the Kyoto Protocol, at the time when the Green Party was one of the

governmental forces in Germany.¹⁸⁸ The first signs of this move can therefore be traced back to the environmental security precedent leading to the publication in 1999 of a collective work on the European perspective on environmental change and security. That was the first time a German author, Sebastian Oberthür, suggested that climate protection policies could represent a means of conflict prevention.¹⁸⁹ The line of research opened by S. Oberthür was followed up in 2001 by the 'Environmental Research Programme' of the German Federal Ministry of the Environment,¹⁹⁰ and then openly disseminated outside Germany during the UNFCCC Conference of the Parties, in Bonn, 2002. On that occasion, S. Oberthür, along with Dennis Tanzler and Alexander Carius (soon to become the leading researchers on this topic), organized and presented a side event on 'Climate Change and Conflict Prevention'.¹⁹¹ The background papers they used to introduce this alternative approach to climate change (paradoxically launched during the mainstream climate-change negotiations) had been explicitly written on behalf of the German government. Most importantly, it already involved Adelphi Consult, a non-profit research organization based in Berlin that would soon become one of the key elements – if not the most relevant one – of the construction of the Climate Change and International Security Discourse. The same year, another prominent German expert on the link between the environment and the security spheres, Hans Günter Brauch, released a detailed study on 'Climate Change, Environmental Stress and Conflict'. As the title clearly indicates, Günter Branch connected the security perspective on climate change with the previous exploration of the interactions between the environment and the security spheres¹⁹² – more precisely, with the empirical studies on environmental stress and the

¹⁸⁸ The real degree of influence of, or the role played by, the Green Party in the development of the Climate Change and International Security Discourse in Germany remains nonetheless mysterious. See J. RIECHMANN, *Los Verdes Alemanes*, 2005, (Madrid: Comares).

¹⁸⁹ S. OBERTHÜR, 'Preventing Environmentally-Induced Conflicts Through Development Policy and International Environmental Policy', in A. Carius and K. M. Lietzmann (eds.), *Environmental Change and Security: A European Perspective*, 1999, (Berlin, Heidelberg: Springer), pp. 249-268.

¹⁹⁰ Environmental Research Programme, Project of the German Federal Ministry of the Environment on 'Evaluation and Development of Strategic Initiatives on Environment and Security Issues' (FKZ 901 19101).

¹⁹¹ S. OBERTHÜR (Ecologic Institute), D. TANZLER and A. CARIUS (Adelphi Research), 'Climate Change and Conflict Prevention: the Relevance for the International Process on Climate Change', Background Paper for the Special Event 'Climate Change and Conflict Prevention', celebrated in Bonn (Germany), 10 June 2002, on the occasion of the 16th meeting of the UNFCCC Subsidiary Bodies. The full text is reproduced in *Climate Change and Conflict: Can Climate Impacts Increase Conflict Potentials? What is the Relevance of this Issue for the International Process on Climate Change?*, (2002) *Environmental Policy*, German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Part III, pp. 113-143.

¹⁹² H. GÜNTER BRAUCH, 'Climate Change, Environmental Stress and Conflict', AFES-PRESS Report for the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety. Also reproduced in *Climate Change and Conflict: Can Climate Change Impacts Increase Conflict Potentials? What is the*

outbreak of violence that had been undertaken during the mid-1990s by the Toronto School and the ENCOP programme.¹⁹³ The confluence of these two waves in H. Günter Brauch's report is not surprising at an initial stage of formation of the Climate Change and International Security Discourse. However, as the Discourse developed and became more detailed and complex, an autonomous 'knowledge' – connected with but different from the environmental security precedent – would be progressively generated.

The next and most important stage in the configuration of the German strategy to create a Climate Change and International Security Discourse began in 2007, the year of the successful culmination of the climate change negotiations, with the adoption of the Bali Road Map and, most importantly, with the publication of the IPCC Fourth Assessment Report.¹⁹⁴ That year, the German Advisory Council on Global Change (generally referred to by its German acronym WBGU) released its study titled 'World in Transition: Climate Change as a Security Risk', one of the reports most quoted thereafter.¹⁹⁵ It will be followed a year later by a second study by A. Carius and D. Tanzler which took up the call of H. Günter Brauch to resurrect it and to work on the basis of the environmental security precedent and to develop their investigation along the lines of the relationship between environmental stress and conflict.¹⁹⁶

Relevance of This Issue for the International Process on Climate Change?, *supra*, Part II, pp. 9-113. November 2002.

¹⁹³ See Chapter 1, Section 4.2.2.

¹⁹⁴ Only a few months later, on 12 December 2007, the IPCC was paradigmatically granted the Nobel Peace Prize.

¹⁹⁵ German Advisory Council on Global Change (WBGU), 'World in Transition: Climate Change as a Security Risk, Summary for Policy-Makers', 29 May 2007, Berlin, pp. 1-13. Previously, the WBGU had contracted the research services of Adelphi Consult for the elaboration of an in-depth study, including several maps and tables, of the impacts of climate change on key sectors (food, land, water, energy) of different regions of the world. See A. CARIUS, D. TANZLER, J. WINTERSTEIN, 'Weltkarte von Umweltkonflikten – Ansätze zur Typologisierung', Externe Expertise für das WBGU-Hauptgutachten, 'Welt im Wandel: Sicherheitsrisiko Klimawandel', 2006 (published in 2008), (Potsdam, Berlin: WBGU), 99p. The influence of the 2007 WBGU Report in the development of the Climate Change and International Security Discourse was noteworthy, for this Report contained important conceptual and policy innovations. One of the definitional innovations is the notion of 'conflict constellations', defined as 'typical causal linkages at the interface of environment and society, whose dynamic can lead to social destabilization and, in the end, to violence', at 2. As to the agenda for work, the WBGU made nine main recommendations: (1) shaping global political change; (2) reforming the United Nations; (3) ambitiously pursuing international climate policy; (4) implementing the energy turnaround in the EU; (5) developing mitigation strategies through partnerships; (6) supporting adaptation strategies for developing countries; (7) stabilizing fragile States and weak States that are additionally threatened by climate change; (8) managing migration through co-operation and further developing international law; and (9) expanding global information and early warning systems (along with the adoption of an integrated approach to the financing of crisis prevention, development co-operation and military spending), at 7-13.

¹⁹⁶ A. CARIUS, D. TANZLER, A. MAAS (Adelphi Consult), 'Climate Change and Security: Challenges for German Development Co-operation,' April 2008, (Eschborn, Berlin), pp. 1-69. Study on behalf of the

Yet, far from remaining within the single outreach of the Federal Ministry of Environment and Conservation of Natural Resources, the bed of preliminary knowledge on the relevance and impacts of climate change for national security interestingly resonated in German national security institutions. Indeed, again in 2007 – and this, for the first time in German history – the Cabinet embarked on the definition of a national security interest and strategy, based on a model imported from the United States of America. At the time, the government was formed by a Grand Coalition of the Christian-Democratic Union of Germany and its sister party, the Christian Social Union (CDU/CSU) with the Social Democratic Party of Germany (SDP); Angela Merkel (CDU/CSU) was the Chancellor and an equal number of cabinet seats has been granted to each coalition party.¹⁹⁷ Despite the fact that such defence and security policy innovation did not receive the support of the Social Democratic Party, the project moved forward and the new National Security Council was thus established. When tasked with the elaboration of the first ‘Security Strategy for Germany’, the Council incorporated a section specifically concerned with the consequences of climate change.¹⁹⁸ Moreover, the launch of this innovative new model was accompanied by a return in German foreign policy to the traditional alliance with the European Union, the North Atlantic Treaty Organization and other western transatlantic organizations,¹⁹⁹ instead of following the foreign policy lines of ex-Chancellor Schröder which had focused on developing bilateral relations with the Russian Federation and China. The initiative on linking climate change to a security discourse benefitted from this change of wind, as Germany began by promoting this approach to climate change in the EU and EU Member States.

2.1.2. European Cradle: Mainstreaming the Climate Change and International Security Discourse across the EU and EU Member States’ Policies

The starting point of the Europeanization of some elements of the German National Security Strategy and, in particular, the consideration given to the consequences of climate change for national and international security, could have been found in the 2003 Security

German Federal Ministry for Economic Co-operation and Development (GTZ), elaborated on the basis of the 2007 WBGU report for policy-makers.

¹⁹⁷ The Grand Coalition was formed after the inconclusive results of the 2005 German federal election, and lasted until the end of the term in 2009.

¹⁹⁸ A. SCHOCKENHOFF, ‘A National Security Strategy for Germany’, 2008, Institut für Strategie-Politik-Sicherheits und Wirtschaftsberatung (ISPSW), Berlin, Germany, pp. 1-11.

¹⁹⁹ See J. DEMPSEY, ‘Germany’s Focus on National Interests’, The New York Times, 5 May 2008, article available at: <<http://www.nytimes.com/2008/05/05/world/europe/05iht-germany.4.12581496.html>>.

Strategy Report of the European Union.²⁰⁰ However, among the security threats to be faced by the EU in the 21st century, this document does not mention climate change nor any of the possible manifestations related to the phenomenon.²⁰¹ This neglect remained unchanged for the following years (2004–2007), in which the EU underwent capital institutional transformations stemming from the enlargement of its membership. However, the accession of Germany to the EU Presidency in 2007 radically changed this picture and propelled the introduction of the link between climate change and security into the EU agenda. The conclusions of President Hans Gert-Pöttering explicitly marked the beginning of the EU process:

*'It is becoming increasingly evident that **climate change will have a considerable impact on international security issues**. The European Council invites the High Representative and the European Commission to work closely together on this important issue and to present a joint report to the European Council in Spring 2008.'*²⁰²

An EU Steering Committee on Climate Change and International Security was thereafter established and the momentum for it developed. Germany thus began looking for allies or supporters of this approach in the EU Member States that could promote and reinforce the appropriation of this approach by the EU.

The United Kingdom was the first Member State to back up the German initiative and quickly became one of its important co-proponents.²⁰³ Immediately taking the lead since 2007,

²⁰⁰ European Security Strategy, 'A Secure Europe in a Better World', Brussels, 12 December 2003, pp. 1-14.

²⁰¹ *Ibid.*, pp. 3-4. The 'key threats' identified by the 2003 European Security Strategy were terrorism, the proliferation of weapons of mass destruction (Iraq war context), regional conflicts (in the Middle East, Kashmir, the African Great Lakes region and the Korean Peninsula), State failure (Somalia, Liberia, Afghanistan under the taliban regime) and organized crime (cross-border trafficking in drugs, women, illegal migrants and weapons).

²⁰² Brussels European Council, 'Presidency Conclusions', document reference: 11177/1/07 - Rev.1- Conc. 2, 21/22 June 2007, paragraph 41, p. 11 [Emphasis added]. The confirmation that the introduction of the Climate Change and International Security Discourse stemmed from Germany can be found in the following document prepared by Adelphi Consult, 'Climate Change and International Security: Activity Mapping of EU bodies and Member States: Activity Profile of Germany', 2008, 10 pp. The profile indicated that: '**Germany initiated the EU Process on Climate Change and International Security by addressing it during its Presidency in 2007. Since then, Germany has continuously supported the EU Process politically and provided resources. It is also a member of the Steering Group for the EU Process**, at. 1 [Emphasis added].

²⁰³ See also Adelphi Consult, 'Climate Change and International Security, Activity Mapping of EU bodies and Member States: Activity Profile of the United Kingdom', 2008, 11 pp.: '**The UK fully supports the EU Process on Climate Change and International Security and is a member of its Steering Group. The main focus of the UK work on Climate Change and International Security is to broaden and deepen the global debate on Climate Change and International Security in those countries who have already started work, such as the U.S., by creating partnerships and sharing best practice and broaden to those countries who have not yet started debating the issues**', at 1. [Emphasis added]. Official confirmation of

the UK assumed the task to present the issue for discussion before the UN Security Council. In this forum, Germany does not count with the legal and political weight of a permanent member like the UK, nor did it have the right to participate or vote at the time, for it was not one of the ten non-permanent members. The UK enterprise was successful in so far as the debate proposed by M. Beckett, UK delegate to the UNSC, took place in April 2007 under the heading 'Energy, Climate and Security', on the basis of the lines of discussion proposed in the UK concept paper. A close look at this document permits identification of the flagrant use of most of the main findings of the 2007 WBGU Report, as well as the use of its innovative wordings which, for instance, conceptualized climate change as a 'threat multiplier'.²⁰⁴

Quickly becoming Germany's strongest EU partner on this issue and 'ambassador' of the discourse before universal international organizations, the UK correlatively took steps to integrate this approach at a national level. A UK Climate Security Desk was thus created, along with the appointment of a Head of Climate Security attached to the Ministry of Foreign Affairs. Moreover, public funds were granted to a two-year research programme dedicated to several specific aspects of the newly born Climate Change and International Security Discourse.²⁰⁵ This promoted a more complex and detailed understanding of the security implications of climate change when compared to the initial 2007 WBGU report, and diversified the sources of knowledge about the links between climate change and security beyond German boundaries. Moreover, the UK seemingly followed up Germany's security policy innovation and also adopted the American model. The first UK National Security Strategy was thus released in

UK's full support to the Climate Change and International Security Discourse can be found in the Letter from Chris Bryant MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman, on 'Climate Change and International Security', dated 10th December 2009, House of Lords (European Union Committee, Foreign Affairs, Defence and Development Policy Sub-Committee C), pp. 6-7. The Letter ends up considering that: *'The process of implementing and operationalising the report's recommendations [EU Council Report on Climate Change and International Security] will help the UK in following a similar process in preparation for any potential future security review or update of the National Security Strategy [...]. Overall, the UK strongly welcomes this report and the increasing interest among EU Member States and other countries, globally, on this issue.'*, at 7 [Emphasis added].

²⁰⁴ Detailed analysis of the operation of the Climate Change and International Security Discourse submitted to universal international organizations is developed in Chapter 3.

²⁰⁵ For instance, the 'Military and Climate Change Project' conducted by the Institute for Environmental Security; the joint project on the security implications of climate change in China, jointly conducted by the UK Royal United Services Institute (RUSI) and the Center for Naval Analysis (US-based corporation), a contracted report on the security implications of climate change in Colombia, conducted by the Center for Naval Analysis; the RUSI research into security implications of climate change in Central America; or the joint UK/French research project on the security implications of climate change in the Sahel, led by the Club du Sahel with the Hadley Centre and local and regional partners; or the scoping study on the vulnerability of global energy infrastructure to the impacts of climate change. See Adelphi Consult, 'Activity Mapping of EU Bodies and Member States: United Kingdom', *supra*, pp. 3-12.

March 2008.²⁰⁶ Undoubtedly influenced by the grave impact of the 2007 flooding in England,²⁰⁷ the pioneering role of the UK before the UN Security Council and the speeches of M. Beckett that followed the Security Council debate,²⁰⁸ the UK National Security Strategy expressly recognized climate change as one of the prospective threats deserving consideration. However, no overall strategy of implementation of the National Security Strategy ensued.²⁰⁹

A similar reaction at a national level can be found in The Netherlands, Germany's second strongest EU partner on the climate change and security linkage. Considering the specific vulnerability of this low-lying country and the warnings of the 2006 Report of the Royal Dutch Meteorological Institute (KMNI), it is not surprising that the 2007–2008 Dutch National Security Strategy and Work Programme dedicated a full section to climate change.²¹⁰

Moreover, the German initiative also found great support in Nordic countries, such as Denmark, Sweden and Finland – all sharing their concern for the future state of the Arctic region. Although these countries are too-weak military powers (as they do not maintain large armies, navies and air forces in spite of being rich) to formally include climate change in their national security strategies, they significantly collaborated in the development of an EU geo-strategic vision on the issue. Of the three, Denmark is the one which had a pivotal role and can

²⁰⁶ Cabinet Office of the British Government, 'The National Security Strategy of the United Kingdom: Security in an Interdependent World', March 2008, (London: The Stationery Office), 64 pp. The UK Strategy includes climate change under the category of drivers of instability and considers that the phenomenon '*is potentially the greatest challenge to global stability and security, and therefore to national security*'. It thereby calls for '*[t]ackling its causes, mitigating its risks and preparing for and dealing with its consequences* [and notes that these actions] *are critical to our future security, as well as protecting global prosperity and avoiding humanitarian disaster*', points 3.34–3.39, pp. 20–21.

²⁰⁷ Thirteen people died and hundreds had to be rescued after parts of South Yorkshire and the East Riding of Yorkshire, and Gloucestershire were flooded. Around 48,000 homes were affected, and the cost for flooded businesses averaged between £75,000 and £112,000. See for instance, BBC News, 18 January 2010, 'England's Floods Cost the Economy 3.2bn Pounds', available at: <http://news.bbc.co.uk/2/hi/uk_news/8464717.stm>; and the Report elaborated by the UK Environment Agency, J. CHATTERTON, C. VIAVATTENE, J. MORRIS, E. PENNING-ROWSELL, S. TAPSELL, 'The Cost of the Summer 2007 Floods in England' (January 2010) Flood and Coastal Erosion Risk Management Research and Development Programme (Bristol: the UK Environment Agency), 51pp.

²⁰⁸ See M. BECKETT, 'The Case for Climate Security' (10 May 2007) *RUSI Journal*, vol. 152, nº 3, pp. 54–58.

²⁰⁹ For a comment on the Strategy, explaining that it departed from the traditionally scattered or fragmented UK practice, which had a 'foreign strategy', a 'defence strategy' and a 'counter-terrorism strategy', as opposed to the single overall National Security Strategy of the USA since WWII, see F. GREGORY, 'The UK's First National Security Strategy: A Critical and Selective Evaluation', (2008) *Analysis of the Real Instituto Elcano*, vol. 78, available at: <http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari74-2008>

²¹⁰ Cabinet Office of The Netherlands Government, 'National Security, Strategy and Work Programme 2007–2008', 2007, (The Hague: Cabinet Office), 52 pp. For an explanatory comment on the place of the Strategy in the history of security planning in the Netherlands, see M. RADEMAKER, 'National Security Strategy of the Netherlands: an Innovative Approach', (2008) *Information & Security*, vol. 23, nº 1, pp. 51–61.

be considered as the 'Nordic Driver'. The national integration of the security approach to climate change in Denmark developed on the basis of a general analysis of the means to improve the integration of climate change into Danish foreign policy. The elaboration of this study was tasked to the International Institute for Sustainable Development and was published in 2007.²¹¹ Ever since then, former Danish Prime Minister, Anders Fogh Rasmussen, has made several references to the linkage between climate change and international security, although, as Steen Nordstrom points out, the Ministry of Climate and Energy refrained from reinforcing or using such a link during the organization of the 15th Conference of the Parties to the UNFCCC held in Copenhagen in December 2009.²¹² Similarly, as reported by the Danish Defence Commission, the Danish defence institutions did not introduce climate change into the 2004–2009 and 2010–2014 Danish Defence Agreements, nor under the 2008 Danish Defence Global Engagement. However, on 6 November 2009, barely one month before the Copenhagen Climate Change Summit, a debate on the linkage between climate change and security policy was held in the Danish Parliament; followed a month later by the informal High-Level Meeting on Climate Change and Security that was, after all, celebrated on 15 December 2009 during the Climate Summit.²¹³ Moreover, Denmark – sometimes together with Sweden and Finland – became an extensive donor for contract research on regional security implications of climate change. Most reports were prepared by the International Institute for Sustainable Development, perhaps the second most influential research community on this issue after Adelphi Consult.

Likewise, the topic attracted the attention of the Swedish Defence Research Agency, which financed an extensive study of the Geopolitics of Climate Change that was released in 2007. The concept of 'climate security' resulting from this report became a policy issue jointly co-ordinated by the Swedish Ministries of Environment, of Foreign Affairs, and of Defence and the Prime Minister's Office.²¹⁴ Finland's financial support and participation in contract research

²¹¹ J. DREXHAGE, D. MURPHY, O. BROWN, A. COSBEY, P. DICKEY, J.-E. PARRY and J. VAN HAM (International Institute for Sustainable Development) and R. TARASOFSKY and B. DARKIN (Chatham House), 'Climate Change and Foreign Policy: An Exploration of Options for Greater Integration', 2007 (Winnipeg, Manitoba: International Institute for Sustainable Development). This work conducted with financial support from the Ministry of Foreign Affairs of the Government of Denmark.

²¹² S. NORDSTROM, 'Climate Security: From Agenda Setting to Policy', March 2010, Faculted for Strategi og Militære Operationer, Royal Danish Defence College, 25 pp., at 7; see also by the same author 'Climate Change and Security Problems: Geographical and Functional Implications for Military Organizations', June 2009, (Copenhagen: Royal Danish Defence College).

²¹³ See Report of the High-Level Panel delivered by the Danish Ministry of Foreign Affairs, 15 December 2009.

²¹⁴ See also M. OSTENSSON, D. K. JONSSON, R. MAGNUSSON and K.-H. DREBORG, '*Energi och säkerhet: framtidsinriktade omvärldsanalyser för Forsvarsmakten* [Energy and Security: Assessment of the Future

– managed by the Ministry of Foreign Affairs of Finland and the Finnish Institute of International Affairs – was more discrete, although it is the only Nordic country to have incorporated climate change into its national security and defence policy.²¹⁵ Finally, it is also worth recalling the support provided by Slovenia, as a member of the EU Steering Committee and under whose Presidency the Committee's joint report was presented.²¹⁶

The engagement of Germany and other EU drivers gave rise to the launch, over a period extending from 14 March 2008 to 8 December 2009, of what was referred to as the 'EU Climate Change and International Security Process' and which had an impact on different areas of EU law and policy. The formal launch of the EU Process can be traced back to the date of publication of the Report of the High Representatives and the European Commission to the European Council on 14 March 2008 (hereafter the High-Level Report).²¹⁷ The document was in fact drafted by Javier Solana in his capacity of Secretary-General of the Council and as EU's High Representative for the Common Foreign and Security Policy, in collaboration with the EU Commissioner for External Relations, Benita Ferrero-Waldner.²¹⁸ Barely a few months later, the effects of the High-Level Report became visible, as the European Commission started paying attention to the position of the EU with regard to the Arctic Region. In a Communication from the Commission to the European Parliament and the European Council on 'The European Union and the Arctic Region', dated 20 November 2008,²¹⁹ the Commission acknowledged the link between climate change and international security and reproduced the wording of the High-Level Report, expressing the need for the EU to reflect upon the melting of the Arctic Region 'in view of the role of climate change as a **"threat multiplier"**'.²²⁰

A month after this first indication, the Climate Change and International Security Discourse left its first trace in the EU's security policy. The Report on the Implementation of

for the Swedish Armed Forces], 2009, (Stockholm: Totalforsvarets Forskningsinstitut/Swedish Defence Research Agency).

²¹⁵ See Prime Minister's Office, 'Finland: Views on the Possible Security Implications of Climate Change', Finnish Security and Defence Policy 2009, Government Report, Publications 13/2009.

²¹⁶ Adelphi Consult, 'Climate Change and International Security – Activity Mapping of EU bodies and Member States: Activity Profile of Slovenia', 2008. Despite its position in the Steering Committee, Slovenia's participation in the promotion of the Climate Change and International Security Discourse has remained secondary ever since.

²¹⁷ Climate Change and International Security: Paper of the High Representative and the European Commission to the European Council, 14 March 2008, document reference: S/113/08, 10 pp.

²¹⁸ This is indicated in the article in the 'Report of the European Council on Climate Change and International Security', (September 2008) *Population and Development Review*, vol. 34, issue 3, pp. 587-593.

²¹⁹ Communication from the Commission to the European Parliament and the Council, 'The European Union and the Arctic Region', Brussels 20/11/2008, document reference: COM (2008) 763 final, 12 pp.

²²⁰ *Ibid.*, at 2.[Emphasis added].

the European Security Strategy, 'Providing Security in a Changing World', released on 11 December 2008, modified the neglected view of the 2003 EU Security Strategy with respect to climate change and finally incorporated the topic as a fully independent item. This measure was reinforced and completed a week later by the Follow-up Recommendations of Javier Solana on 'Climate Change and Security'.²²¹ Noting that '*the EU is well suited to taking forward the climate security agenda*',²²² J. Solana considered that '*climate change represents a fundamental challenge that should be in the mainstream of EU foreign and security policies and institutions*'.²²³ He therefore recommended the adoption of three measures: (1) more detailed analysis of the security implications at a regional level (that is, contracting specialized research on how climate change intensifies existing drivers of instability); (2) integration of these analysis into early warning mechanisms (that is, mainstreaming the results of the specialized contract research on the issues); and (3) an intensified dialogue with third countries and organizations.²²⁴

On the basis of J. Solana's recommendations, the Council elaborated its Conclusions on Climate Change and Security, and formally adopted and released them the following year (two days before the opening of the 2009 Copenhagen Climate Change Summit).²²⁵ The conclusions confirm that the Climate Change and International Security Discourse is a crosscutting issue which has been mainstreamed in several areas of EU policy, including the promotion of new partnerships with developing countries affected by climate change impacts:

'[T]he Council stated that climate change and its international security implications are part of the EU's wider agenda for climate, energy and the Common Foreign and Security Policy, and therefore central to the endeavours of the EU. This adds an incentive to strengthen EU's comprehensive efforts to reduce emissions and to increase its energy security' [...]

The Council concluded that more vulnerable parts of human society in developing countries and emerging countries will be adversely affected, and will need our support, but developed countries will also suffer. Adaptation to climate change, sound policies on displacement migration and conflict prevention are the most effective ways of dealing with the international security implications of climate change. We will address these issues in a spirit of partnership between developed and developing countries and confirm our commitment to take bold action on climate change mitigation in order to limit temperature

²²¹ J. SOLANA (High Representative of the EU), Joint Process Report and Follow-up Recommendations on Climate Change and International Security, 18 December 2008, document reference CL08-241EN, 3pp.

²²² *Ibid.*, at 1.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Council of the European Union, Council Conclusions on Climate Change and Security, 2985th Foreign Affairs Council Meeting, 8 December 2009.

*increases to below a threshold of 2°C and to effectively address adaptation in the Copenhagen Summit.*²²⁶

The first and most immediate consequence of the institutionalization of the Climate Change and International Security Discourse in the EU was the creation of a body of empirical knowledge on the topic and the spread of scientific reports independently of the scientific authority of the IPCC and the political context in which the IPCC operates. The input to the body of 'climate and security knowledge' stemmed both from the previously mentioned reports commissioned by EU Member States and from a range of studies financed by the EU itself. On the one hand, in addition to the early German reports of a general scope elaborated by S. Oberthür, A. Carius, D. Tanzler and H. Günter Brauch, the increased interest of EU Member States led to a mushrooming of reports on the regional security implications of climate change. For instance, on the occasion of the Nordic–African Foreign Ministers Meeting, Denmark commissioned in-depth regional and sub-regional studies on Africa (West Africa in particular)²²⁷, as well as on the Middle East.²²⁸ Similarly, the UK developed studies on the consequences of climate change for security in Central America.²²⁹ On the other hand, as a means to better assess the geo-political consequences of the phenomenon for the future influence of the EU in the international arena, the EU provided funding for research on these matters following the same pattern of the national studies – from general analysis to concrete regional appraisals. The first general Report commissioned by the EU thus provided a synopsis of the 'Regional Security Implications of Climate Change',²³⁰ and was followed by a second report on 'Climate Change, Conflict and Fragility: Understanding the Linkages, Shaping Effective Responses'.²³¹ Then, the EU-commissioned research projects went on to analyse the

²²⁶ *Ibid.*, paragraphs 2 and 4,.

²²⁷ O. BROWN, A. CRAWFORD, 'Climate Change and Security in Africa: A Study for the Nordic–African Foreign Ministers Meeting', March 2009, (Winnipeg, Manitoba: International Institute for Sustainable Development), 30 pp. From the same authors, 'Assessing the Security Implications of Climate Change for West Africa: Country Case Studies of Ghana and Burkina Faso', 2008, (Winnipeg, Manitoba: International Institute for Sustainable Development), 66 pp. This report was also elaborated by the IISD and received the financial support of Denmark.

²²⁸ O. BROWN, A. CRAWFORD, 'Rising Temperatures, Rising Tensions: Climate Change and The Risk of Violent Conflict in the Middle East,' 2009, (Winnipeg, Manitoba: International Institute for Sustainable Development), 42 pp., elaborated by the IISD with financial support of Denmark and reviewed by A. CARIUS and A. MAAS, of Adelphi Research (Germany).

²²⁹ S. FETZEK, 'Climate-related Impacts on National Security in Mexico and Central America' (2009) *RUSI*.

²³⁰ A. MAAS and D. TANZLER (Adelphi Research), 'Regional Security Implications of Climate Change: A Synopsis', conducted for the DG External Relations of the European Commission under a contract to the German Ministry for the Environment, Nature Protection and Nuclear Safety.

²³¹ D. SMITH and J. VIVEKANANDA, 'Climate Change, Conflict and Fragility: Understanding the Linkages, Shaping Effective Responses, Initiative for Peace-building Early Warning' (November 2009). This study

range of situations that the Climate Change and Security Discourse could embrace in different parts of the world – in Asia,²³² the Indian Ocean and Pacific Ocean islands,²³³ and, finally, scenarios for Middle America.²³⁴

Throughout this process of creating a body of knowledge on climate change and international security, the German influence continued to play a crucial role. To begin with, all of the EU-funded reports were contracted to members of Adelphi Research, the German consultancy organization which had been tasked with the elaboration of the early German reports. The influence of this organization has been such that it prepared, under the auspices of the German Ministry of Environment and Natural Resources, a European Activity Mapping and Strategy Development stemming from the Climate Change and International Security Discourse,²³⁵ a document highlighting how the Climate Change and International Security Discourse would potentially affect EU law and policy, not only in the realm of security, but also in those of energy and foreign policy.²³⁶

The need to embark on the great energy transition had been acknowledged in the EU before the Climate Change and International Security Discourse emerged. Indeed, the innovations in EU energy policy, ranging from an increase in energy efficiency to the elaboration of a medium-term policy of renewable energy investments, had been launched in 2006 and can be found in the Green Paper, 'A European Strategy for Sustainable, Competitive and Secure Energy', as well as in the Roadmap on Renewable Energy established the same year

followed the lines of the author's previous work 'A Climate of Conflict: the Links between Climate Change, Peace and War' (2007) (London: International Alert), 44 pp.

²³² A. CARIUS, A. MAAS, K. FRITZSCHE (Adelphi Research), 'Climate Change and Security: Three Scenarios for South West Asia' (2009); and, from the same authors, 'Climate Change and Security: Scenarios for South East Asia' (2009). Both reports were prepared for the Directorate-General External Relations of the European Commission

²³³ A. CARIUS, A. MAAS, J. BARKEMEYER, 'Climate Change and Security: Two Scenarios for the Indian-Pacific Ocean Island States' (2009) (Berlin: Adelphi Research). Report prepared for the Directorate-General External Relations of the European Commission.

²³⁴ A. CARIUS and A. MAAS, 'Climate Change and Security: Three Scenarios for Middle America' (2009) (Berlin: Adelphi Research). Report prepared for the Directorate-General External Relations of the European Commission; and finally, A. CARIUS, A. MAAS, K. FRITZSCHE, 'Climate Change and Security: Three Scenarios for South West Asia' (2009) (Berlin, Adelphi Research), 27 pp. Report prepared for the Directorate-General External Relations of the European Commission.

²³⁵ ADELPHI Meeting report (financed by German Federal Ministry of Environment, Nature Conservation and Nuclear Safety), 'Climate Change and International Security: Towards a European Activity Mapping and Strategy Development', 25-26 June 2009, Berlin Executive Briefing.

²³⁶ See K. SWOLSKY and C. KAUNERT, 'The EU and Climate Security: the Case of Successful Norm Entrepreneurship?' (2011) *European Security*, vol. 20, issue 1, 24 pp.; and L. RUIZ DÍAZ, 'La introducción del "Cambio Climático" en la Agenda de Seguridad Internacional: ¿Una Nueva Estrategia de Seguridad para la Unión Europea?' [The Inclusion of "Climate Change in the International Security Agenda: A New Security Strategy for the European Union?'], (2009) *Revista de la Facultad de Derecho de la Universidad de Granada*, vol. 12, pp. 203-221.

by the Commission.²³⁷ The former EU energy policy was thus just beginning to endure a profound transformation when the Climate Change and International Security Discourse was introduced into the EU agenda by the German officer H. Gert-Pöttering. As a result of this timely coincidence and the closeness of the subject matters, both trends were connected from a policy perspective. Although energy security constituted a widely developed and autonomous policy area of the EU, it became quickly associated with, and cited as, one of the most important items embraced by the Climate Change and International Security Discourse. Arguably, the Discourse had an impact on the EU's approach to energy policy from 2008 onwards. The association of the EU's path towards energy transition with the security consequences of climate change arguably reinforced the idea that thorough reconfiguration of the EU energy strategy was an indisputable need rather than a desirable policy from an economic and environmental perspective (areas in which the EU leadership is usual). Indeed, the Climate Change and International Security Discourse confirmed that the current system of energy access, supply and distribution in its various forms needed a profound reconfiguration so as to drastically reduce the dependency of the EU on energy resources (oil and gas). The vulnerability of the EU arising from its energy dependency, the studies revealed, would become all the more acute as the States and regions of origin of the resources or countries of passage for pipelines would be facing an increased instability stemming from the socio-political effects of environmental stress linked with the adverse effects of climate change. Relevant EU institutions were thus called upon to examine this issue.²³⁸

On the other hand, the first effect of the Climate Change and International Security Discourse in EU foreign policy in fact affected the Discourse itself, which was extended to regions close to the EU (either geographically or strategically). After an informal dialogue with the United States, the extension to the OSCE and NATO served to consolidate the Climate Change and International Security Discourse as conceived and understood by its proponents.

²³⁷ European Commission, Green Paper: 'A European Strategy for Sustainable, Competitive and Secure Energy', 8 March 2006, document reference: COM(2006) 105; and European Commission, Renewable Energy Road Map, 'Renewable Energies in the 21st Century: Building a More Sustainable Future', Commission Communication of 10 January 2007, document reference: COM(2006) 848 final. On how the energy security objective is pursued in the European Union, see J. M. GLACHANT and N. AHNER, 'Is Energy Security an Objective of the EU Energy Policy?', in J.-A. VINOIS (ed.) *EU Energy Law, Volume VI: The Security of Energy Supply in the European Union*, vol. VI, 2012 (Deventer, Claeys & Casteels), pp. 5-21.

²³⁸ J. SOLANA, Follow-Up Recommendations on the Implementation of the European Security Strategy, *supra*, Section 4, at 4.

2.2. Consolidation of the Discourse: The Extension to the Organization of Security and Co-operation in Europe and the North Atlantic Treaty Organization

2.2.1. Informal Transatlantic Extension: Exchanging Information with the USA – Parallel Approaches to Climate Change and International Security

In accordance with J. Solana explicit remark, the external action of the EU that the Climate Change and International Security Discourse necessarily required an early and crucial engagement with the United States of America.²³⁹ As already pointed out in Chapter 1, the USA began introducing environmental concerns into the realm of official national security policy ever since the release of its 1991 National Security Strategy.²⁴⁰ Thereafter, developments in American governmental institutions on the notion and a possible concrete policy of environmental security took place, partly incentivized by the results of the empirical research programmes on the link between environmental stress and the outbreak of violent conflict. Therefore, the political arena of the United States of America counted with this background when in the early years of the new millennium Andrew Marshall began paying attention to the effects that climate change could have on U.S. national security. As Director of the Office of Net Assessment of the United States Department of Defense, since its creation by the Nixon

²³⁹ International Institute for Strategic Studies, 'The IISS Transatlantic Dialogue on Climate Change and Security', Report to the European Commission Directorate-General for External Relations, January 2011 (Winnipeg, Manitoba: IISD), 28 pp. This Report presents the results of the event launched by the International Institute for Strategic Studies (IISD) on 25 February 2009, which was funded by a grant from the European Commission, with the purpose of analysing the impact of climate change on global security and stability. As the Report states, the dialogue included some of the foremost environmental and security experts from government, including the military and intelligence communities, academia, international organizations, and the private sector. The publication of the Report was intended 'to inform policymakers on both sides of the Atlantic on how to most effectively address climate change', at 1.

²⁴⁰ U.S. State Department, 'A National Security Strategy for the United States', (Administration of George H. W. Bush, August), 1 August 1991, (Washington, D.C.: The White House), which reads, at 2: '*But even after such a success [the collapse of the Soviet Union], we face not only the complex security issues outlined above, but a new agenda of **new kinds of security issues**. [T]he environmental depredations of Saddam Hussein have underscored that protecting the global ecology is a top priority on the agenda of international cooperation – **from extinguishing oil fires in Kuwait to preserving the rain forests to solving water disputes to assessing climate change**. The upheavals of this era are also giving rise to human migrations on an unprecedented scale, raising a host of social, economic, political and moral challenges to the world's nations.*' The Strategy also incorporates a independent sub-section entitled 'the Environment', which reads at 22: '*Global environmental concerns include such diverse but interrelated issues as stratospheric ozone depletion, climate change, food security, water supply, deforestation, biodiversity and treatment of wastes. A common ingredient in each is that they respect no international boundaries. **The stress from these environmental challenges is already contributing to political conflict**. Recognizing a shared responsibility for global stewardship is a necessary step for global progress. Our partners will find the United States a ready and active participant in this effort.*' [All emphasis added].

administration in 1973,²⁴¹ A. Marshall decided to allocate a 100,000 USD research grant for the promotion of studies on this issue. Peter Schwartz and Dough Randall were thus tasked with the preparation of the first report on climate change and security of the United States of America, entitled 'An Abrupt Climate Change Scenario and its Consequences for United States Security', released in 2003.²⁴² Based on previous scientific analytical models of the Ice Age, the report sought to anticipate the worst-case consequences for the United States that the possible collapse of the thermohaline circulation could provoke. It quickly attracted a lot of media attention.²⁴³

Four years after this first explicit approach to climate change from a security perspective in U.S. official governmental institutions, the Center for Naval Analysis (CNA) released the highly influential and widely cited report 'National Security and the Threat of Climate Change'.²⁴⁴ Mirroring the WBGU and EU High-Level Reports, climate change was articulated as a '*threat multiplier*'.²⁴⁵ Most interestingly, the focus of this report was for the first time expressly centred on the geo-strategic impacts of climate change and the effects of the phenomenon on the United States capacity in terms of military command and operative force.²⁴⁶ Such a line of investigation marked the orientation of the studies that followed.

²⁴¹ According to the description of the position provided by the U.S. Department of Defense, '*The Director of Net Assessment [...] develops and coordinates net assessments of the standing, trends, and future prospects of U.S. military capabilities and military potential in comparison with those of other countries or groups of countries so as to identify emerging or future threats or opportunities for the United States.*' DoD Directive 5111.11, available at: <<http://odam.defense.gov/omp/pubs/GuideBook/DNA.htm>>. See also webpage of the U.S. Department of Defense, available at: <www.odam.defense.org>.

²⁴² P. SCHWARTZ and D. RANDALL, 'An Abrupt Climate Change Scenario and Its Implications for United States Security', October 2003, (Washington, D.C.: The Pentagon).

²⁴³ The Pentagon, 'The Pentagon and Climate Change' (May 2004) *Monthly Review* (editors), vol. 56, issue 1, 6pp. See also examples of the reaction in American public opinion to the Pentagon report: 'Climate Collapse: The Pentagon's Weather Nightmare', *Fortune* (February 9, 2004); 'Now the Pentagon Tells Bush: Climate Change Will Destroy Us', *Observer* (London), (February 22, 2004); 'Pentagon-Sponsored Climate Report Sparks Hullabaloo in Europe', *San Francisco Chronicle* (February 25, 2004); 'The Sky is Falling! Say Hollywood and, Yes, the Pentagon', *New York Times* (February 29, 2004). Also reaction in Davos: Robert B. Gagosian, 'Abrupt Climate Change, Should We Be Worried?', *World Economic Forum*, Davos, Switzerland, 27 January 2003,

²⁴⁴ CNA Analysis & Solutions, 'National Security and the Threat of Climate Change', 2007 (Alexandria, Va.: Center for Naval Analysis). The CNA is an organization that provides research and analysis support to the U.S. Navy and other sections of the Department of Defense on the basis of the CNA contract, a federally Funded Research and Development Center. Today it comprises two major operating components: the Center for Naval Analysis and the Institute for Public Research. Through the Institute for Public Research, the CNA also provides support to other federal government agencies, state and local governments, foundations, and other customers.

²⁴⁵ *Ibid.*, at 1: '*Climate change can act as a threat multiplier for instability in some of the most volatile regions of the world, and it presents significant national security challenges for the United States*'.

²⁴⁶ The U.S.A. also gives strategic importance to the impacts of climate change on the survival of the U.S. military bases located in low-lying Island States, such as that the military base of Diego García, located in

Seemingly, it also consolidated the issue as an important and autonomous object of concern in U.S. security and defence circles, as can be inferred from the Statement of Record on 'National Intelligence Assessment of the National Security Implications of Global Climate Change to 2030', delivered in June 2008 by Thomas Fingar in the House of Representatives (to the Permanent Select Committee on Intelligence and to the Select Committee on Energy Dependence and Global Warming). T. Fingar's Statement highlighted the fact that the future research plans on this topic will follow three different streams: (a) impacts of climate change in specific countries and regions; (b) impacts of climate change on remediation strategies on U.S. interests; and (c) the geo-politics of climate change or how the phenomenon may transform the relationships amongst major powers. Investigation programmes and reports developed thereafter consistently followed Fingar's roadmap for the research. After the release of reports on the impacts of climate change on different regions (which followed a similar pattern to the reports funded by the European Union); a second range of publications dealt with the geo-political impacts of climate change in major powers and key regions for the United States of America – China, India, Russia, North Africa, Mexico, the Caribbean, south-east Asia and Pacific Island States.²⁴⁷ These were followed by the release in 2009 and 2010 of two reports – elaborated through contract research by the CNA – more specifically centred on the key United States national security and energy policy, a geo-political area closely associated with climate change.²⁴⁸

These three lines of research within the U.S. national security and intelligence communities facilitated an exchange of information, particularly with the United Kingdom – a connection which in turn may have animated the favourable disposition of the United Kingdom to assume a leading role as promoter of the Climate Change and International Security

the southern Indian Ocean and which, as mentioned in the CNA Report, 'serves as a major logistics hub for U.S. and British forces in the Middle East', *supra*, p. 37. Many other important military bases are located in Pacific low-lying island States threatened by sea-level rise, such as Guam.

²⁴⁷ Such research effort comprises three phases, the last of which is still pending. The first phase led to the release of the following reports: National Intelligence Council (NIC), 'China: The Impact of Climate Change to 2030 – Geopolitical Implications', 2009. From the same institution and time of publication: 'India: The Impact of Climate Change to 2030 – Geopolitical Implications'; 'Russia: The Impact of Climate Change to 2030 – Geopolitical Implications'; 'South East Asia: The Impact of Climate Change to 2030 – Geopolitical Implications'; 'Mexico, Caribbean and Central America: Climate Change to 2030 – Geopolitical Implications'; 'North Africa: The Impact of Climate Change to 2030 – Geopolitical Implications'. The second phase led to the release of the following reports: NIC, 'China: The Impact of Climate Change to 2030: A Commission Report'; 'India: The Impact of Climate Change to 2030: A Commissioned Report'; 'North Africa: The Impacts of Climate Change to 2030: A Commissioned Report'; 'Pacific Islands: The Impacts of Climate Change to 2030: A Commissioned Report'.

²⁴⁸ Center for Naval Analysis (CNA), 'Powering America's Defense: Energy and the Risks to National Security', May 2009, (Washington, D.C.: CNA), 74 pp.; and CNA, 'Powering America's Economy: Energy Innovation at the Crossroads of National Security Challenges', July 2010, (Washington, D.C.: CNA), 49 pp.

Discourse in universal international organizations. Nonetheless, what began as an informal transatlantic exchange of information and an innovative idea for agenda-setting on climate change and security acquired a new formally institutionalized dimension within two pre-existing transatlantic regional security organizations: the Organization of Security and Co-operation in Europe (OSCE) and the North Atlantic Treaty Organization (NATO). Both developments set the basis for the consolidation of the Climate Change and International Security Discourse in transatlantic (hegemonic) regions.

2.2.2. Formal Transatlantic Extension: Intertwined Introduction of the Climate Change and International Security Discourse into the Agendas of Two Regional Security Organizations (OSCE and NATO)

The introduction of the Climate Change and International Security Discourse into the agenda of the OSCE relied on the previous developments within the organization tending to incorporate environmental co-operation among Member States as part of a comprehensive approach to security. For over a decade, the section on environment – incorporated in ‘basket two’ of the OSCE dealing with Co-operation in the Field of Economics, of Science and Technology and of the Environment – was mainly devoted to co-operation for the prevention and management of transboundary pollution.²⁴⁹ Yet, since the adoption of the 1989–1990 Vienna Report on Recommendations on the Protection of the Environment of the OSCE,²⁵⁰ greater developments in this domain ensued.²⁵¹ The first development was the creation in 1997 of a new position of Co-ordinator of OSCE Economic and Environmental Acts, following the adoption of Decision n° 194²⁵². Integrated into the OSCE Secretariat, the new Co-ordinator

²⁴⁹ Conference on Security and Co-operation in Europe, Final Act, adopted in Helsinki, 1 August 1975. Basket II (on Co-operation in the Field of Economics, Science and Technology of the Environment): *‘The Participating States, convinced that their efforts to develop co-operation in the fields of trade, industry, science and technology, the environment and other areas of economic activity contribute to the reinforcement of peace and security in Europe and in the world as a whole’.*

²⁵⁰ Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, adopted in Sophia (Bulgaria), 16 October–3 November 1989.

²⁵¹ The Meeting reviewed the work in the fields of prevention and control of the transboundary watercourses in respect of potentially hazardous chemicals, and pollution of transboundary watercourses and international lakes, and examined possibilities for further measures and co-operation, including improved exchange of information (paragraph 3). The Participating States’ recommendations included, inter alia, the elaboration of legal instruments (international convention or code of practice) on the prevention and control of the transboundary effects of industrial accidents; use of transboundary watercourses and international lakes; the exchange of information and co-ordination efforts in order to achieve closer harmonization concerning the management of hazardous chemicals.

²⁵² Organization for Security and Co-operation in Europe, Permanent Council, Decision n° 194, ‘Mandate for a Co-ordinator of OSCE Economic and Environmental Activities’, adopted at the 137th Plenary Meeting, 5 November 1997, document reference: PC. DC/194, PC Journal n° 137, Agenda item 2.

was tasked with '*strengthening the ability of the Permanent Council and the OSCE institutions to address economic, social and environmental aspects of security*'.²⁵³ The Co-ordinator's priorities included, inter alia: enhancing the interaction and consultation of the OSCE with relevant international organizations and institutions active in the environmental field, based on the concept of co-operative security and aimed at the development of synergies; assessing potential security risks stemming wholly or in part from economic, social and environmental factors; and developing a work programme including but not limited to annual implementation reviews and work related to the Security Model.²⁵⁴

The creation of this position provided the structural basis for further developments in this area to emerge, particularly since the release in 2002 of the Porto Ministerial Declaration, adopted along with Decisions n° 2 and n° 5.²⁵⁵ The Declaration departed from the determination of the participating States to protect their people not only from existing but also from emerging threats to security, and to develop new responses to the changing nature of threats to security.²⁵⁶ It thus acknowledged that security and stability could be threatened by economic and environmental factors.²⁵⁷ Decision n° 2 specifically provided that developing an OSCE strategy to address threats to peace and security in the 21st century required adapting or supplementing the existing instruments and mechanisms of co-operation within the organization;²⁵⁸ whereas Decision n° 5 emphasized the need to improve economic and environmental co-operation through the entire OSCE area by means of increased project activities.²⁵⁹

The Porto Declaration and Decisions reflected the context in which an unprecedented long-term collaboration programme in the field of environmental protection was being launched, in association with security and peacekeeping purposes in and among OSCE Member States, and known as the *Environment and Security Initiative* (ENVSEC). Originally established by the OSCE, the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP), the launch of the ENVSEC Initiative was arguably favoured by

²⁵³ *Ibid.*, paragraph 2.

²⁵⁴ *Ibid.*, points 2 and 3.

²⁵⁵ OSCE, Porto Ministerial Declaration, 'Responding to Change', adopted at the Tenth Meeting of the Ministerial Council, 6–7 December 2002, reference document: MC.DOC/1/02. This meeting followed up the lines of the Charter for European Security adopted at the previous OSCE Summit in Istanbul in 1999.

²⁵⁶ *Ibid.*, paragraph 7.

²⁵⁷ *Ibid.*, paragraph 1.

²⁵⁸ OSCE Decision n° 2, 'Development of an OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century', adopted at the 10th OSCE Porto Ministerial Council in Porto, 6–7 December 2002, document reference: MC(10). DEC/2, paragraph 5 of the operative part.

²⁵⁹ OSCE, Decision n° 5, 'Enhancing the Role of the OSCE Economic and Environmental Dimension', adopted at the 10th OSCE Porto Ministerial Council, document reference: MC(10).DEC/5, paragraph 3.

the appointment of a German Officer, Monika Griefahn, as Co-ordinator of the OSCE General Committee on Economic Affairs, Science, Technology and the Environment, as well as by the direct participation of Adelphi Consult researchers in the elaboration of the regional assessments of the ENVSEC Initiative.²⁶⁰ The Initiative sought to facilitate environmental co-operation among key public decision-makers of South-Eastern Europe, Eastern Europe and Central Asia. It assesses environmental problems which threaten security, societal stability and peace within and across borders in these regions so as then to develop and implement work programmes with the relevant actors. After presentation, at the Kiev Ministerial Meeting in May 2003, of the successful results of its Pilot Phase, from September 2002 to May 2003,²⁶¹ the Initiative moved on and several projects were launched. By 2007, ENVSEC had a portfolio of more than 50 projects with an overall budget of 11.3 million USD. Besides, it had been strengthened by the incorporation in 2004 of NATO as an associate member of the Initiative, followed in 2006 by the United Nations Economic Commission for Europe (UNECE) and the Regional Environmental Centre for Central and Eastern Europe (REC).²⁶²

Such solid a structural background on environmental co-operation for security and peacekeeping purposes in the OSCE was particularly helpful for the Climate Change and International Security Discourse to permeate this organization after its institutionalization at the EU. Anticipation of the extension that such Discourse would have in the OSCE can be found in the Preamble of the 2007 Madrid Ministerial Declaration on Environment and Security, adopted four months after H. Gert-Pöttering first made a reference to climate change and international security before the European Council in his Presidency Conclusions. The opening of the Madrid Declaration thus stated (in part):

[R]ecognizing climate change as a long-term challenge; acknowledging that the United Nations climate process is the appropriate forum for negotiating future global action on climate change, and the OSCE as a regional security organization under Chapter VII of the UN

²⁶⁰ While Monika Griefahn – co-founder of Greenpeace Germany and politician of the SPD – was appointed in 2003 as Officer of the General Committee on Economic Affairs, Science, Technology and the Environment, the participation of Adelphi Consult can be traced back to the very beginning of the ENVSEC Initiative. See A. CARIUS (Adelphi Research, on behalf of UNDP, UNEP and OSCE), ‘Environment and Security Initiative: Addressing Environmental Risks and Promoting Peace and Stability – The Post-Kiev Process’, 24 April 2003.

²⁶¹ During the Pilot Phase, the ENVSEC Initiative focused on how environmental stress affects human security in Central Asia and south-eastern Europe. The consultative effort of this first Phase was undertaken by the facilitating institutions in the regional workshops ‘Environment for Europe’ and ‘Environment and Security Programme in Central Asia’, respectively celebrated in Belgrade in December 2002, and in Ashgabat, in January 2003.

²⁶² OSCE, Annual Report 2007, at 94.

*Charter, has a complementary role to play within its mandate in addressing this challenge in its specific region [...]*²⁶³

Six months later, the confirmation of the reception of the Climate Change and International Security Discourse by the OSCE came with the adoption of the 2008 Astana Declaration of the OSCE Parliamentary Assembly, which reads, in part:

'22. [E]xpressing concern over the impact that accentuated security challenges related to climate change, more particularly droughts, water scarcity and desertification, may have on highly sensitive areas such as the Eastern Mediterranean [...]

33. Welcoming the role that the OSCE can play in promoting environmental security and its complementary action with the United Nations in combating climate change [...]

35. Taking note, with the adoption of the European Climate Plan, of the driving role of the European Union in combating climate change,

36. Remembering that all these phenomena have a hand in exacerbating pre-existing tensions and adding to instability, thereby threatening security [...]

*38. Recalling the conclusions established in the report of the High Representative on the common foreign and security policy and the European Commission on security risks posed by climate change, at the European Council session of March 2008 [...]*²⁶⁴

The effects of the incorporation of the Climate Change and International Security Discourse into the OSCE were akin to the policy consequences of the institutionalization of the Discourse in the EU; developments in two main fields of activity of the OSCE ensued.

First, the Discourse first served to reactivate the dialogue on energy security in the OSCE area, whereby Member States were called to *'commit themselves to a global energy transformation towards energy efficiency, renewable energies and energy savings'*.²⁶⁵ Secondly, the Discourse gave an important input to a new line of investigation on the impacts that climate change could possibly have on the security of the OSCE area, and encouraged the development of risk assessment and early warning networks for climate-related phenomena, such as floods and droughts. Thus, during the 2009 OSCE Chairmanship Conference, held in Bucharest and dedicated to 'The Security Implications of Climate Change in the OSCE region', the Co-ordinator of the OSCE Committee on Economic and Environmental Activities (OCEEA),

²⁶³ OSCE, Madrid Declaration on Environment and Security, adopted on 30 November 2007 at the Fifteenth Meeting of the Ministerial Council, Madrid 20–30 November 2007, document reference: MC.DOC/4/07, paragraph 4 of the Preamble. [Emphasis added].

²⁶⁴ OSCE, Astana Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Seventeenth Annual Session, Astana 29 June–3 July 2008, chapter II on Economic Affairs, Science, Technology and Environment, pp. 4-5. [Emphasis added].

²⁶⁵ *Ibid.*, paragraph 43. Energy security constitutes one of the most important co-operation pillars of the OSCE. See, for instance, OSCE Decision n°12/06, 'Energy Security Dialogue in the OSCE', adopted in Brussels (Belgium), on 5 December 2006, document reference: MC.DEC/12/06; followed by OSCE Decision n°6/09, 'Strengthening Dialogue and Cooperation on Energy Security in the OSCE Area', adopted in Athens (Greece), on 2 December 2009, document reference: MC.DEC/6/09; and the OSCE, Resolutions on Energy Security and 'Energy Cooperation', adopted at the OSCE Parliamentary Assembly held in Vilnius (Lithuania), on 29 June– 3 July 2009.

Goran Svilanovic, defended the creation of a specific programme dealing with this topic under the auspices of his Office, despite the fact that such a proposal was at odds with the global economic crisis and zero budget growth.²⁶⁶ His demand succeeded and, in February 2010, the OCEEA launched a research project seeking to develop scenarios for different OSCE sub-regions and quantify the consequences of climate change for natural resources, energy and food availability. With financial support from Spain, the OCEEA commissioned the report 'Shifting Bases, Shifting Perils: A Scoping Study on Security Implications of Climate Change in the OSCE Region', published in 2010. It is important to note that all studies within this programme were undertaken by researchers of Adelphi Consult.²⁶⁷ Counting with the information and knowledge about OSCE countries stemming from the implementation of ENVSEC programmes between 2003 and 2010, the same authors were tasked with the elaboration of a regional study on climate change and security for the OSCE region. The study, published in 2010 and elaborated by Adelphi Consult (in co-operation with Chatham House and Cibera), unsurprisingly mirrors the previous reports contracted by the European Union on the regional impacts of climate change.²⁶⁸

Despite the idea that the OSCE may be identified as the main locus of extension of the Climate Change and International Security Discourse, the role played by NATO in such a process cannot be overlooked. The interest and concern of NATO regarding the effects of environmental issues on international security find their origins in the Cold War, since, in 1969, the Committee on the Challenges of Modern Society (CCMS) was created with the aim of exchanging experience and information on environmental problems with regard to defence and security.²⁶⁹ Twenty-eight years later – in parallel to the creation in 1997 of the position of

²⁶⁶ G. SVILANOVIC (Co-ordinator of the OSCE Economic and Environmental Activities), 'The Security Implications of Climate Change in the OSCE region: Opening Remarks', Chairmanship Conference, Bucharest, 5 October 2009, document reference: SEC.GAL/168/09, 12 October 2009. See also the Opening Remarks of the OSCE Secretary-General, Marc Perrin de Brichambaut, delivered the same day, document reference: SEC.GAL/167/09, 12 October 2009; and the Statement by Mats Aberg, Swedish EU Presidency, 'Climate Change and Security: Challenges and Opportunities in the OSCE region', document reference: PC.DEL/805/09, 19 October 2009. Among the other speakers, it is interesting to note the presence of Achim Maas of Adelphi Consult, who made a PowerPoint presentation on 'Climate Change and Security: Policies, Research and Scenarios'.

²⁶⁷ See Section 2.1 *supra*.

²⁶⁸ A. MAAS *et al.*, 'Shifting Bases, Shifting Perils: A Scoping Study on Security Implications of Climate Change in the OSCE Region and Beyond', 2010, (Berlin: Adelphi Consult), 74 pp.

²⁶⁹ Although NATO's primary focus is joint military defence and political strategic co-operation, Article 2 of the Treaty also provides for the 'development of peaceful and friendly international relations'. This provision has thus been considered as the pillar of civil co-operation of the Organization, and environmental protection has been part of it ever since its birth. See Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Press Release, 'Environmental Co-operation within the NATO', March 2007.

Co-ordinator of OSCE Economic and Environmental Acts – NATO launched the Euro-Atlantic Partnership Council (EAPC), embracing former Soviet States and mainly centred on co-operation on environmental issues in the catchment areas of the Black and the Caspian Seas. The incorporation of NATO as an associate member of the OSCE ENVSEC Initiative in 2004 may thus be explained by the similarity of EAPC's and ENVSEC's respective fields of activity. Moreover, following the reorganization of NATO's structure in 2006, the Committee on the Challenges of Modern Society merged into the Committee on Science for Peace and Security (SPS Committee),²⁷⁰ an institutional fusion which resulted in the development of research on environmental security funded and contracted by the SPS Committee.²⁷¹ Soon after, specific attention of the organization to climate change emerged, when former NATO Secretary-General Anders Loh Rasmussen (at the time also Prime Minister of Denmark), delivered a landmark speech on NATO's role in response to the security implications of climate change. Barely two months before the celebration in his country of the 2009 Copenhagen Summit on Climate Change (COP.15/MOP.5), A. L. Rasmussen emphatically stated:²⁷²

*'[W]hen it comes to climate change, building security doesn't only mean with the military. But it also doesn't exclude the military either; on the contrary, our traditional security structures will have a role to play. Which brings me to my third point: I believe that **NATO should begin a discussion on how we – NATO as an organization, and individual Allies as well – can do better to address the security aspects of climate change***'.²⁷³

From the outset, A. L. Rasmussen suggested four improvements: a better integration of climate change into the national security strategies of NATO Member States; adapting NATO's partnerships so as to take climate change into account; developing assessments on how climate change impacts impair the military capacities of NATO's armed forces (for instance, by affecting military bases located on low-lying islands); and finally promoting an

²⁷⁰ For an overall presentation of the origins and rationale of the Committee on Science for Peace and Security (SPS), see <<http://www.nato.int/issues/science-environmental-security/index.html>>.

²⁷¹ See for instance the celebration of NATO's Second Science Forum on Environmental Security, celebrated on 12 March 2008, which looked at current global security concerns related to environmental disruption, including – but not limited to – climate change (other themes dealt with were the management of shared water resources and energy security) (<http://www.nato.int/cps/en/natolive/news_8408.htm?selectedLocale=en>). A list of the projects on environmental security undertaken through the SPS programme and detailed information on them can be found at <http://www.nato.int/science/studies_and_projects/nato_funded/index.htm>.

²⁷² A. L. RASMUSSEN, Speech on Emerging Security Risks: Climate Change, Piracy and Cyberdefence, Address by NATO's Secretary-General to a Lloyd's Conference in London (UK), on 1 October 2009. [Emphasis added]. The event brought together 200 high-level representatives from the security and business communities, including the Estonian Minister of Defence and the Secretary-General of the International Maritime Organization.

²⁷³ *Ibid.*

increase in the fuel efficiency of military vehicles so as to reduce the overall dependence of NATO forces on foreign sources of fuel. The boost given by this landmark speech was reinforced by the previously mentioned celebration of the side-event at the Copenhagen Climate Summit on 'Climate Change and Security', where A. Rasmussen recalled that the military is generally the first responder to natural disasters, and summarized NATO's approach to dealing with the security implications of climate change as '*consultation, adaptation and operation*'.²⁷⁴ Further involvement of the organization with climate change included the celebration of a seminar on warfare ecology,²⁷⁵ as well as the mention of climate change in NATO's 2010 Strategic Concept.²⁷⁶

All in all, what stems from this initial stage is that the initiative to approach climate change from a security perspective resulted from the governmental input provided by Germany, which thereafter brought this perspective to the European Union and its Member States and promoted its first institutionalization at a regional level. Within the EU, the security approach to climate change began to take shape and thus acquired a standing of its own that, from 2007, could be clearly differentiated from the environmental security precedent. The Climate Change and International Security Discourse can thus be said to have emerged not only linguistically – climate change somehow became unlinked to the wider range of environmental issues that may have fallen within the scope of previous studies on environmental security – but was also accompanied by the first accounts of the conceptual contours it could acquire. The first studies, contracted by the EU and produced within this young discursive framework, sought to provide for a detailed evaluation of the geo-political and security impacts of climate change in different regions of the world. In doing so, these first studies also laid down a prospective account, not only of how the EU itself would be directly hit by adverse climate change impacts, but most importantly of how the effects of climate change in other regions of the world would correlatively bring about changes in the geo-

²⁷⁴ NATO, 'NATO Secretary-General Debates Climate Change Security Threats in Copenhagen', NATO Press Release, 15 December 2009, available at: http://www.nato.int/cps/en/natolive/news_60163.htm.

²⁷⁵ G. E. MACHLIS, T. HANSON, Z. ŠPIRIĆ, J. E. MCKENDRY (eds.) 'Warfare Ecology: a New Synthesis for Peace and Security', Proceedings of NATO Advanced Studies Institute, 2010, (Berlin, Heidelberg, New York: Springer).

²⁷⁶ NATO, Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization: Active Engagement, Modern Defence', adopted by the Heads of State and Government at the NATO Summit in Lisbon, 19–20 November 2010, paragraph 15, p. 13: '*Key environmental and resource constraints, including health risks, climate change, water scarcity and increasing energy needs, will further shape the future security environment in areas of concern to NATO and have the potential to significantly affect NATO planning and operations*'.

strategic position of the EU in the international political arena. At that stage, a particular concern for effects that climate change might have on energy resources was highlighted.

Meanwhile, on the Atlantic shore, a parallel concern for the security impacts of climate change developed within U.S. national security institutions previously familiar with the post-Cold-War empirical and theoretical studies on environmental security.²⁷⁷ Despite the fact that the studies contracted by the Pentagon involved different experts, those tasked with the reports for the EU and individual EU Member States, the general approach to the matter by both sides was similar; the USA also understood the security implications of climate change as a geo-political matter and placed special emphasis on its relation to energy security. Yet, despite sharing an overall common approach to the Climate Change and International Security Discourse, it was the EU that stood as the active driver of the circulation of the Discourse to other specialized regional organizations. In the OSCE, the recent reception of the Climate Change and International Security Discourse, since 2008, was facilitated by the prior existence of an environmental security co-operation programme (ENVSEC) which, in its early years of activity (2003–2007), had mainly focused on the development of environmental co-operation amongst energy providers around the Caspian Sea. As the actors involved in the ENVSEC programme included Russia – the EU’s principal gas and oil provider – the OSCE was arguably a particularly well suited forum for adopting the conceptual approach to the Climate Change and International Security Discourse, which is focused on energy security, for reinforcing it. The fact that the same research community that had previously elaborated the reports on Climate Change and International Security for the EU and its Member States – and simultaneously continued doing so – was contracted by the OSCE may be said to have had two effects. On the one hand, it undoubtedly favoured the consolidation of the EU approach to the Discourse – e.g. as a geo-political concern. On the other hand, it gave an input to the research community which could arguably be identified as a distinctive ‘epistemic community’. Finally, the involvement of NATO with the Climate Change and International Security Discourse – both through its direct participation in the OSCE ENVSEC programme, and through the development of its own autonomous line of investigation of this theme within the NATO SPS programme – closes the circle of construction of the Climate Change and International Security Discourse in hegemonic regions. The next stage to be addressed concerns the circulation of the Discourse beyond the scope of direct influence of the EU, towards two of the most vulnerable regions. The Pacific Island States, as well as the majority of the African countries united by the threat to

²⁷⁷ See *supra*, Chapter 1, Section 4.

the existential survival of either their populations or the States themselves – contrast strikingly with the solid capacity of the States where the Climate Change and International Security Discourse has emerged to adapt to climate change.

3. CIRCULATION OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO THE MOST VULNERABLE REGIONS: IN SEARCH OF A LEGITIMIZING PARTNER

3.1. Introduction of the Discourse into the Agenda of the Pacific Islands Forum: Securitization of the Predominant Developmental Approach to Climate Change

3.1.1. Shifting Oceans: Indian vs. Pacific Island States as Loci of Reception of the Climate Change and International Security Discourse

Among the small island States that generally resonate within the international arena as active actors of the climate change negotiations – firmly defending the construction of a rooted international concern for the serious impacts that the phenomenon may entail for the survival of their States – the Maldives is probably the first to come to mind. Located in the Indian Ocean, this State counts with administrative divisions comprising 1,190 very small islands around 26 natural atolls, each of which is surrounded and delimited by an immense ring of breakwater coral reef (the seventh largest coral reef in the world, covering 8,500 km²).²⁷⁸ Barely 10 per cent of the islands are actually inhabited, among which 80 per cent have become tourist resorts. The State capital, Malé, houses more than a third of the total population (103,000 people) within an area of scarcely two square kilometres.²⁷⁹ Most importantly, the average altitude of the Maldives scarcely reaches 0, 90 metres above sea level, and its highest point is at 2.4 metres – barely two centimetres above the height of Sun Ming Ming, the tallest basketball player so far recorded in history.

These characteristics, coupled with a political decision of former President Maumoon Abdul Gayoom, made of the Maldives one of the first States – if not the first – to call the attention of the international community to the adverse impacts of climate change. Back in 1987, at the time when Gorbachev's new thinking on international law was bringing about the introduction of the notion of international environmental security into the agenda of the UN

²⁷⁸ Information extracted from website of the Permanent Mission of the Republic of Maldives to the United Nations, available at <<http://www.un.org.mv/v2/?lid=2>>.

²⁷⁹ The rest of the population (298,968 inhabitants according to the 2006 Census) is scattered throughout the country. Malé is thus one of the most densely populated cities in the world. The Maldives was a British protectorate from 1887 until 1965 when it gained independence and became a republic.

General Assembly, President Gayoom gave his first speech on climate change impacts before the Maldives' Commonwealth partners.²⁸⁰ His statement led to the creation of the Commonwealth Expert Group on Climate Change and Sea-Level Rise, a group which thereafter took the lead as commissioner of case-studies on adverse effects of climate change in several vulnerable countries, such as Bangladesh, Guyana, Tonga, Tuvalu and Kiribati.²⁸¹ A second study, released in March 1989, was also unilaterally contracted by the Maldives.²⁸² Twenty years later, as Gayoom himself stated before the same audience, the result of this landmark contribution was, in his view, that *'the Commonwealth became one of the first international bodies to discuss and take action on the issue of global warming'*.²⁸³

Besides, the scope of his 1987 initiative was not limited to the Commonwealth. A few days after pronouncing his speech in Vancouver, M. A. Gayoom stood at the UN headquarters before the General Assembly to deliver a statement on the threat of climate change and sea-level rise. The occasion was, according to M. A. Gayoom himself, the first time that the issue of climate change was raised before world leaders at the United Nations.²⁸⁴ A year later, the General Assembly accepted the creation of the IPCC, which was finally set up in 1988. During the last years of the Cold War, the driving force of the Maldives remained very much alive. Most importantly, in 1989, it hosted the first Small Islands Conference on Sea-Level Rise ever celebrated, at which the participating States adopted the Malé Declaration on Global Warming and Sea-Level Rise.²⁸⁵ This declaration paved the way for the creation a few years later of such

²⁸⁰ Commonwealth Heads of Government Meeting, Speech of President Maumoon Abdul Gayoom, Vancouver, British Columbia, 13–17 October 1987.

²⁸¹ M. HOLDGATE, 'Climate Change: Meeting the Challenge', 1987 (London: Commonwealth Secretariat). Following the publication of this Report – arguably the first major intergovernmental report on climate change and sea-level rise – Commonwealth Heads of State agreed to adopt in 1989 the Langkawi Declaration on Environment, which went on to influence the 1992 Rio Earth Summit.

²⁸² A. J. EDWARDS, *The Implications of Sea-Level Rise for the Republic of Maldives*, June 1989, Report to the Commonwealth Expert Group of Climate Change and Sea-Level Rise (Centre for Tropical Coastal Management (University of Newcastle-upon-Tyne)).

²⁸³ An anthology of former President Gayoom's speeches on the global environmental challenge and the security of small-island developing States has recently been published in the book entitled *Paradise Drowning*, 2008, (Singapore: Business Mirror Perspective) with a foreword by R. K. Pachauri, Chairman of the IPCC. The book aimed at commemorating his 20 years of diplomacy in these matters and was launched at the 2008 UN-sponsored Business and the Environment Conference, held in Singapore, and counted with the presence of Achim Steiner, Executive Director of the United Nations Environment Programme.

²⁸⁴ UNGA, Verbatim Record A/42/PV.41, 19 October. 1987, pp. 17-31. Considering that President Gayoom's speech followed that of Mrs Brundtland presenting the Report of the Commission on Environment and Development, 'Our Common Future', his presentation of the threat of sea-level rise was framed, on that occasion, as an issue pertaining to the capacity of climate change to impair the realization of 'sustainable development'.

²⁸⁵ Malé Declaration on Global Warming and Sea-Level Rise, adopted at the First Small States Conference on Sea-Level Rise, held in Malé, Republic of Maldives, 14–18 November 1989. Participating

an important political coalition as the Alliance of Small Island States (AOSIS), specifically conceived to operate during the mainstream climate change negotiations. The Maldives firmly asserted that the development of global partnerships was a key element of the overall strategy seeking to face climate change challenges, and that the creation of AOSIS contributed tremendously to the development of such a strategy.²⁸⁶ The active participation and continuing leading role of the Maldives in the climate change negotiations were particularly epitomized when, in 1997, it became the first country to sign the Kyoto Protocol.

Two decades after the launch of this environmental and foreign-policy strategy, President Gayoom recalled, before a meeting of the Royal Commonwealth Society that took place in London on 17 July 2007, the history of Maldives' active leadership in the fight against climate change. Bearing in mind the catastrophic effects of the 2004 tsunami on the south-eastern part of the Indian Ocean, his speech made a call '*[t]o bring greater creativity and innovation to the global discourse on climate change*'.²⁸⁷ A couple of weeks after delivering this speech before its Commonwealth partners, the Permanent Representative of the Republic of Maldives to the United Nations repeated the core message at an Informal Thematic Debate, held at the UN General Assembly, on 'Climate Change as a Global Challenge', with an important addendum. The opening statement of the Permanent Representative's speech for the first time raised the notion of 'security' being connected with the danger of sea-level rise:

'Throughout the latter half of the 20th century we have all come to this General Assembly to collectively address threats to our security and independence with creativity and commitment. In the 21st century, our independence is threatened not by invading armies but by rising sea levels; not by global conflict but by global warming. (...) For the Maldives, climate change is short of an existential crisis'.²⁸⁸

Considering the longstanding leading role of the Maldives, its openness to new creative and innovative forms of approach to the climate change discourse, as well as the statement of its Permanent Representative reproduced above, one could have expected the Maldives to be

States included small-island States from the South Pacific, the Caribbean, the Indian Ocean and the Mediterranean Sea: (in alphabetical order) Antigua and Barbuda, Barbados, Brunei Darussalam, Cyprus, Fiji, Grenada, Kiribati, Maldives, Malta, Mauritius, Seychelles, Tonga, Trinidad and Tobago, Vanuatu.

²⁸⁶ Statement of the UN Resident Co-ordinator for the Alliance of Small Island States Conference, 'Human Dimension of Global Climate Change', 14 November 2007, available at: <<http://www.un.org.mv/v2/index.php?lid=14&nid=20>>.

²⁸⁷ Speech by His Excellency Mr. Maumoon Abdul Gayoom, President of the Republic of Maldives, 'Is There a Right to a Safe Environment?', Royal Commonwealth Society, London, Tuesday 17 July 2007. Full summary of the meeting available at: <<http://www.iisd.ca/mea-l/guestarticle58.html>>.

²⁸⁸ Statement by His Excellency Dr. Mohamed Latheef, Permanent Representative of the Republic of Maldives to the United Nations, during the informal debate of the General Assembly on the theme 'Climate Change as a Global Challenge', UN Headquarters, New York, 31 July–1 August 2007, p. 1. [Emphasis added].

the first vulnerable State to be targeted by the EU for circulation of the Climate Change and International Security Discourse, and even that its reception would have occurred quite naturally. Yet, the Maldives seemingly took another path, preferring to put forward a different innovative approach to climate change focused on linking human rights with the climate change discourse and aiming at the launch of a process of eventual recognition of *a new right* to a safe and sustainable environment.²⁸⁹ Once again, this new proposal of the Maldives quickly resonated and gathered widespread support in the international community. To begin with, the United Nations Development Programme (UNDP) elaborated the 2007–2008 Report on ‘Fighting Climate Change: Human Solidarity in a Divided World’,²⁹⁰ which was followed by the unanimous adoption, on 25 September 2008, of the United Nations Human Rights Council Resolution 7/23 on ‘Human Rights and Climate Change’.²⁹¹ The Resolution stemmed from the proposal of the Maldives to humanize climate change effects, as they had up until then been almost exclusively approached from a scientific – rather than a socio-economic – perspective. Linking the discourses on human rights and climate change arguably helped to reinforce political pressure on the need to develop financial mechanisms for climate change adaptation measures.

The same year in which Resolution 7/23 was adopted, democratic elections in the Maldives put an end to three decades of authoritarian government led by M. A. Gayoom. However, this radical change in the internal political shape of the country did not affect the essence of the Maldives foreign strategy regarding climate change. Pursuing the line traced by his predecessor in this field, the newly elected President, Mohammed Nasheed, added some important innovations as to the operability of this policy, claiming in his speech of investiture:

‘[W]e can do nothing to stop climate change on our own and so we have to buy land elsewhere. It’s an insurance policy for the worst possible outcome. After all, the Israelis [began by

²⁸⁹ *Ibid.*, at 8. The idea of coining a ‘new right’ was opposed to the previous predominant understanding that environmental human rights simply existed to effect already existing civil, social, economic and political rights (life, right to food or clean water etc.).

²⁹⁰ Human Development Report 2007/2008, ‘Fighting Climate Change: Human Solidarity in a Divided World’, 2007, (New York: United Nations Development Programme), 399 pp.

²⁹¹ Human Rights Council, Resolution 7/23, ‘Human Rights and Climate Change’, 28 March 2008, 41st meeting, adopted by consensus without a vote. See also, the Submission of the Maldives to the Office of the UN High Commissioner for Human Rights (25 September 2008), prepared by the Government of Maldives with the assistance of the Centre for International Environmental Law (CIEL) and Ms. Kim Smaczniak (Harvard Law School). Maldives’ submission was eventually supported by 80 co-sponsors from all regional groups.

*buying] land in Palestine [...] We do not want to leave the Maldives, but we also do not want to be climate refugees living in tents for decades.*²⁹²

On the same occasion, M. Nasheed also announced that a new Sovereign Wealth Fund would be created with the taxes on tourist revenues, with a view to purchasing land in neighbouring countries with similar cultural, religious and even meteorological characteristics. However, as such a Fund is yet to be created, the veracity of ex-President Nasheed's real intention has been put into question.²⁹³ All in all, the Maldives has undeniably been seen as a driving actor with a significant initial input into the effort to put the sea-level-rise issue on the agenda of the UN in respect of international co-operation. Nonetheless, in recent years, the innovations that this country has put forward have not taken the form of approaching climate change from an international security perspective. Rather, recent efforts of Maldives' climate change foreign policy have been directed towards the launch of a different discourse strategy, one seeking to develop the link between climate change and human rights. Although both innovative trends are complementary, their origin, conception and final direction and purpose run in parallel.

In fact, rather than originating in the Indian Ocean, the support for and the embracing of the Climate Change and International Security Discourse by small island States can be located in the Pacific Ocean. The twelve independent Pacific Island States (Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu) have a limited defensive capacity. In contrast to the hegemonic regions, in which the EU and the USA are linked through specialized regional security organizations (the OSCE and NATO), Pacific Island States can count on a fully effective regional co-operation framework that deals exclusively with security matters. For security and defence policies, they rely and depend on bilateral agreements with regional powers, particularly Australia, New Zealand and, to a lesser extent, China, India and Japan. Yet, far from political dissolution and demobilization, this group of small island States generally joins in the

²⁹² A video of President Nasheed is available at <http://edition.cnn.com/2008/WORLD/asiapcf/11/11/maldives.president/index.html#cnnSTCVideo>. Nasheed was proclaimed one of the 2009 Environment Heroes by Time Magazine: http://www.time.com/time/specials/packages/article/0,28804,1924149_1924152_1924195,00.html. [Emphasis added].

²⁹³ For instance, a press article reported that the Maldives UN envoy, seeking to clarify the intentions of President Nasheed on the Sovereign Wealth Fund, stated that the Maldives '*neither wished nor was planning relocation*', but that the announcement of the possible creation of such a Fund had nonetheless had '*the desired effect of raising the awareness of the international community to the stark reality that the Maldives faces*', in T. DEEN. 'Climate Change: Small Islands Await Haitian-Type Disaster', 19 January 2010, Intern Press Services (News Agency), available at: <http://www.ipsnews.net/2010/01/climate-change-small-islands-await-haitian-type-disaster/>.

same group or coalition of States within the United Nations organs, organizations and specialized agencies. First of all, they are bound by their common membership in the group of Small Island Developing States (SIDS),²⁹⁴ where they stand together with small island States with a low-level capacity for adaptation located in the Caribbean Sea and in the Indian Ocean. Secondly, they are all united via the AOSIS political coalition that operates in the climate change negotiations,²⁹⁵ again working together with small island States located in other areas, but which may have a heterogeneous degree of economic development and differing levels of capacity to adapt to the adverse effects of climate change.

3.1.2. Forging Ties: Reinvigorated Political Partnership and Innovative Financial Assistance for Climate Change Adaptation as Vehicles of Implementation of the Climate Change and International Security Discourse

In addition to being part of the same political groups within global organizations and institutions, Pacific Island States closely co-operate with Australia and New Zealand, mainly through the Pacific Islands Forum. Created in 1971 under the name of Pacific Islands Secretariat, this co-operative framework progressively acquired a higher level of integration. By 2000, the former Secretariat was renamed Forum and, like the OSCE, divided and structured its activity around three pillars: (a) economic governance; (b) political governance and security; and (c) strategic partnerships and co-ordination.²⁹⁶ Although the Forum initially prioritized the enhancement of economic co-operation between small island States and the two major regional powers, developments in the second line of work, on political governance and security, have taken place since the Secretariat was re-baptized Forum in 2000. More precisely, after the adoption in 2000 of the Biketawa Declaration, co-operation in the field of conflict prevention flourished.²⁹⁷ Five new lines of work have been launched as a result of the

²⁹⁴ Small Island Developing States (SIDS) were recognized as a distinct group at the UN Conference on Environment and Development, held in Rio de Janeiro, 3–14 June 1992. The list of SIDS is annually updated and today comprises 37 SIDS which are also UN Member States (including 12 Pacific Island States: Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu), and 14 SIDS which are not UN Member States (including the Cook islands and Niue which are part of the Compact of Free Association with New Zealand).

²⁹⁵ The Alliance of Small Island Developing States counts with 38 UN Member States, along with other non-self-governing territories or non-independent States that are members of UN regional commissions.

²⁹⁶ Website of the Pacific Islands Forum available at:

<http://forum.forumsec.org/pages.cfm/political-governance-security/conflict-prevention/>.

²⁹⁷ Pacific Islands Forum, 'Biketawa Declaration on Conflict Prevention', adopted at the 31st Summit of Pacific Island Leaders, held in Biketawa (Kiribati), on 28 October 2000. The Declaration was adopted following the coup d'état in Fiji and the ethnic tensions in the Solomon Islands, and led to the engagement of Forum Member States (including Australia and New Zealand) in peacekeeping operations in the region.

Declaration, the last being centred on policy development and co-ordination of assistance to address the underlying causes of conflict.²⁹⁸ The objectives of the latter line of work, as described below, mark the starting point of the Forum's involvement with climate-related issues from a security – and not only an economic or developmental – perspective:

*'In partnership with Member States, regional agencies and **international donors**, the Secretariat develops evidence-based policy to help address the **underlying causes of conflict** (such as socio-economic disparities, land) and potential **exacerbating factors** (such as **climate change, natural disasters**, urbanisation). For example, one important part of this work has been a focus on efforts to manage and reduce land-related conflict in the Pacific through the Land Management and Conflict Minimisation project.'*²⁹⁹

Despite this initial acknowledgement, the Forum still required a few years to openly embrace the Climate Change and International Security Discourse. Considering that most Pacific Island States are listed as small island developing States (SIDS) and sometimes even as Least Developed Countries, it is not surprising that, for the first three decades of the Forum's existence, the core narrative of the Member States' regional collaboration was that of developmental sustainability. Its weight and importance relentlessly permeated the work of the Forum and the direction of its policies, even in the first five years that followed the adoption of the 2000 Biketawa Declaration – which, as explained above, launched the co-operation in the field of conflict-prevention by considering climate change as an exacerbating factor of conflict. The regional approach to climate change from a developmental perspective remained steadily unchanged until the Ten-Year Pacific Plan and the New Forum Agreement were adopted in 2005.³⁰⁰ Both policy instruments operated a shift in the approach of the

²⁹⁸ The other four lines of work seek: the development of regional dialogue; developing and strengthening regional conflict responses; gender mainstreaming; and partnerships. On the last line of action on policy development and co-ordination of assistance to address the underlying causes of conflict, see <<http://forum.forumsec.org/pages.cfm/political-governance-security/conflict-prevention/>>.

²⁹⁹ *Ibid.* [Emphasis added]. The Land Management and Conflict Minimisation Project does not address the issue of territorial disappearance as the Maldives are doing with the creation of the Public Fund. This project has focused on resolving land disputes in Member States, recognizing the centrality of customary land tenure in the lives of the people of the Pacific and combining economic development and conflict prevention perspectives. More information on this Project available at: <<http://www.forumsec.org/pages.cfm/political-governance-security/conflict-prevention/land-management-conflict-minimisation.html>>.

³⁰⁰ The constitutive treaty for the Pacific Islands Forum currently in force is the Agreement Establishing the Pacific Islands Forum, adopted at Tarawa (Kiribati), on 30 October 2000. However, in 2004, as part of a range of recommendations to reform the Forum, Leaders agreed on reviewing this constitutive Agreement to reflect the new purposes and functions of the Forum. The resulting 'New Agreement' was opened for signature on 27 October 2005, along with the ten-year 'Pacific Plan for Strengthening Regional Integration and Cooperation'. While the former instrument has been signed by the sixteen Forum members and will enter into force once it is ratified by all of them, the latter is a 'living instrument' that evolves regularly with the upcoming visions of Pacific leaders on regional integration. It has thus been revised twice already, in 2007 and, more recently, in 2013.

Forum to climate change, from there on seen not only as providing a general framework for sustainable development, but also requiring the development of disaster-reduction co-operation policies. As the 2005–2006 Annual Report of the Forum indicates, the Sustainable Development Programme was rationalized in 2006. Divided into Priority Initiatives, the Ten-Year Pacific Plan listed Disaster and Climate Change.³⁰¹ Nonetheless, despite this evolution, in 2007 and 2008 the Forum seemingly got back to its roots, in so far as sustainable development was reinforced as the core and defining narrative of its policy. This was likely the result of the influence exerted by the Mauritius Strategy on Sustainable Development approved the year before at the UN General Assembly.³⁰²

It is striking to note that, during the period 2005–2008, not one single Press note on climate change was released on the official website of the Pacific Islands Forum. Yet, as developed in Chapter 3, the activity of the Forum regarding climate change – and, most particularly, the Climate Change and International Security Discourse – did resonate in the corridors of the UN General Assembly between 2008 and 2009.³⁰³ The Forum's Annual Report of that period also indicates that this was the time when the Forum incorporated the Climate Change and International Security Discourse as part of its internal operations. The Report of the meeting of the Forum's Regional Security Committee, held at the Forum's headquarters in Suva, 4–5 June 2009, states:

'There was discussion on the impacts of climate change on security and consideration of a range of priority regional and national security issues, including reporting to members on Forum activities under the Forum's Biketawa Declaration, which marks its 10th year of operation'.³⁰⁴

Besides, the same document indicates, under the heading of 'human security', that collaboration with the United Nations Development Programme should be enhanced with

³⁰¹ Pacific Islands Forum, Annual Report 2005–2006, at 35.

³⁰² Pursuant to the mandate given by the UN General Assembly (in UNGA Res. 57/262), the high-level Mauritius International Meeting held in Port Louis, Mauritius, in January 2005. This was the culmination of a 10-year review of the Barbados Programme of Action for the Sustainable Development of Small Island Developing States. The outcome of this meeting was the Mauritius Strategy for the Further Implementation of the Programme of Action on the Sustainable Development of the Small Island Developing States (the 'Mauritius Strategy for Implementation'), adopted on 14 January 2005, and endorsed later by UNGA Res. 65/2, 'Outcome Document of the High-level Review Meeting on the Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States', of 25 September 2010, 18th plenary meeting, document reference: A/RES/65/2. The 2008 Niue Declaration adopted by the Pacific Islands Forum states that the Forum sought the accomplishment of the goals previously set out in the Mauritius Strategy for Implementation.

³⁰³ Details of this process are developed in Chapter 3.

³⁰⁴ Pacific Islands Forum, Annual Report 2008–2009, at 12. [Emphasis added].

respect to a certain number of issues, *'including work on the regional interface between climate change and security'*.³⁰⁵ Arguably, the fact that, before 2008, the Pacific Islands Forum essentially approached climate change as an environmental and developmental issue – or, at best, as an issue requiring enhanced action on disaster prevention – indicates that Pacific Island States received the security approach to climate change from outside the region. Thus, the approach to climate change from a security perspective was not developed by Pacific Island States autonomously and in parallel to the launch in the EU of the Climate Change and International Security Discourse in 2007–2008. Rather, it is possible to assert that an inter-regional circulation of the Discourse took place, from its forum of origin in the EU to the Pacific Islands Forum. The underlying reasons of this theme-based alliance between the EU and the Forum are certainly difficult to discover and even more difficult to prove. Though unwilling to make ungrounded speculations, it is still worth pointing out various data which may give some indications.

First of all, it is important to recall the connection between some Pacific Island States and Germany – the leading driver of the first institutionalization of the Climate Change and International Security Discourse within the EU. The influence of this State in the south-east Pacific region stems from its former colonial presence, which is directly recalled in the 2009 Majuro Declaration on Climate Change adopted by the Federated States of Micronesia, the Marshall Islands and Palau. Interestingly, this Declaration links the historical influence of Germany with the present close connection of this country with the three signatory Pacific Island States in matters related to climate change adaptation:

'14. [W]e recall our historic and ongoing close friendship with Germany, and we note the historic role of Germany through its former Pacific territorial possessions, including as expressed in the 1885 Treaty of Friendship between the Marshallese chiefs and Germany, and further the important role of Germany within the context of European Union, we:

a) Note Germany's national commitment for 40% reduction in greenhouse gas emissions below 1990 levels by 2020, should European Union Member States agree to a 30% reduction over the same period of time;

*b) Warmly welcome Germany's commitment to assisting with advancing comprehensive climate adaptation strategies for small island developing states.'*³⁰⁶

Thereby, paragraph 14 b) of the Majuro Declaration offers an indication of the means through which the support and adoption by the Forum of the Climate Change and International Security Discourse originated in the EU may have been ensured. Seemingly, the

³⁰⁵ *Ibid.*, at 14.

³⁰⁶ Majuro Declaration on Climate Change, adopted at the 9th Micronesian Presidents Summit, held in Majuro (Republic of the Marshall Islands), 16–17 July 2009, paragraph 14. [Emphasis added].

collaboration between these two regional organizations – the EU and the Pacific Islands Forum – may have flowed from the German commitment to enhance assistance on climate change adaptation. Financial assistance for adaptation can be sought through the international regime on climate change (UNFCCC-KP track), as well as through parallel partnerships between States – acting either in their individual capacity or as part of the policy of an organization to which they belong. Ever since the colonial States withdrew from the region, Australia and New Zealand had been the major donors to the Pacific Island States. It is therefore an area with close economic ties to – and dependency on – two Commonwealth countries.³⁰⁷

Nonetheless, the European Union has been promoting external policies seeking to increase its influence and economic presence in the region. The benchmark of this course of action can be traced back to the adoption of the 2006 EU Strategy for a Strengthened Partnership with the Pacific.³⁰⁸ Following the suggestion of EU High Representative, J. Solana, laid down in his recommendations for the implementation of the EU Security Strategy, co-operation between the EU and the States of the Pacific Islands Forum was strongly reinforced from 2008 onwards. First, both institutions jointly declared and acknowledged the serious current impacts of global warming, climate change and sea-level rise on the *'economic, social, cultural and environmental well-being, security and future survival of Pacific island countries'*,³⁰⁹ a co-operation which was then institutionalized through the launch in 2010 of the Joint EU–Pacific Initiative on Climate Change.³¹⁰ Secondly, in parallel to the development of political ties between the two organizations, the circulation of the Climate Change and International Security Discourse was facilitated by the creation of the major framework through which financial assistance from the EU to the Forum would operate. Indeed, by a communication of the EU Commission to the European Council, the creation of the Global Climate Alliance, which was meant to provide EU Member States with a channel for their respective Official Donor Assistance (ODA), was announced in 2007.³¹¹ Financial assistance from this source is received by States vulnerable to climate change impacts, particularly Least

³⁰⁷ Australia, New Zealand, Japan and the United States have a strong influence in Pacific Island States as main financial donors of official development aid. Detailed information by country can be found at: <http://www.aidflows.org/>.

³⁰⁸ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 29 May 2006, 'EU Relations with the Pacific Islands – A Strategy for a Strengthened Partnership', COM (2006) 248, Official Journal C 184, of 8 August 2006.

³⁰⁹ Declaration by the Pacific Islands Forum and the European Union on Climate Change, adopted on 7 November 2008.

³¹⁰ See Memorandum of Understanding, 'Joint Pacific–EU Initiative on Climate Change', signed on 15 December 2010, in Strasbourg (France).

³¹¹ Information on the Global Climate Alliance, including data on the different country and regional projects, can be found at: <http://www.gcca.eu/>.

Developed Countries (LDCs) and Small Island Developing States (SIDS). Thus, although the Alliance can operate in countries beyond the Pacific region, the establishment of this framework resulted in a strong increase in Official Developmental Assistance funds to Pacific Island States; within the 10th European Development Fund (2008–2013), 25 million euros for 2009–2010 were mobilized for climate change adaptation in the Pacific region. Since 2011, two regional projects have been launched in the Pacific for a total amount of 19.4 million euros, with a view to supporting the preparation of adaptation road maps, financing the implementation of concrete actions in participating countries, and implementing activities that strengthen capacities and institutions to effectively respond to climate change.³¹²

Henceforth, as much as the Climate Change and International Security Discourse was construed by hegemonic regions to predict and evaluate the evolution of their geo-political positions in international relations (obstacles to their military capacity, increased dependency on non-reliable States to have access to natural resources, effects of climate variability on the operability of their overseas military bases, etc.), it has served Pacific Island States to unify their discourse on climate change adaptation and to formulate a common strategy opening up new international financial avenues.

3.2. Introduction of the Discourse into the Agenda of the African Union: Diversification of the Sectors of Inter-Regional Co-operation

3.2.1. Reminiscing 'Green Ghosts': African Scenarios of Environmental Stress and Conflict as Natural Loci of Reception of the Climate Change and International Security Discourse

Africa is perhaps the continent where the destabilizing adverse impacts of climate change and their capacity to become a 'threat multiplier' can be best observed. Already in the mid-1990s, several case studies were conducted in African countries as the basis for empirical

³¹² The priority areas of the first project are coastal-zone management, health, infrastructure and overall development, and poverty reduction; it is planned for a duration of four years (2011–2015), counts with a budget of 11.4 million euros and is implemented in nine Pacific Island States (Cook Islands, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, Palau, Tonga and Tuvalu). More information on this project can be found at: <<http://www.gcca.eu/technical-and-financial-support/regional-programmes/secretariat-of-the-pacific-community-global-climate-change>>. The second project is centred on education, research and technological development for climate change adaptation and disaster risk reduction; it is planned for a duration of three years (1/2011 to 12/2014), counts with a budget of 8 million euros and is implemented in fourteen Pacific Island States (Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu). More information on this project can be found at: <<http://www.gcca.eu/technical-and-financial-support/regional-programmes/secretariat-of-the-pacific-community-global-climate-change>>.

research on the link between environmental stress and the outbreak of violent conflict.³¹³ For instance, after the 1993–1994 Rwandan civil strife, some studies suggested that the crisis may have had its roots – or was at least enhanced by – the dispute confronting Tutsis and Hutus over land which had been degraded by the advance of desertification.³¹⁴ Another paradigmatic example may be found in Kenya. In 2004, Wangari Mattai was awarded the Nobel Peace Prize for her community work to restore and replant Kenyan forests that were also progressively disappearing as a result of desertification; this initiative led to the launch of the widely known ‘Green Belt Movement’.³¹⁵ Similarly, only a few years after this movement was founded, the violent conflict in Sudan erupted in which farmers and nomads were opposed. The Sudan crisis triggered the first conflict analyses that openly and directly took into consideration how climate change could be harmful for the security and stability of a country – or even of a whole region. It was also one of the first times that a specialized agency of the United Nations had approached a particular conflict from a climate change and international security perspective; the 2007 Report on Darfur, elaborated by UNEP, followed by the declarations of the UN Secretary-General, Ban-Ki Moon, clearly marked a landmark moment in this sense.³¹⁶

The Sudan crisis and the approach to it by UN institutions from the climate change and international security perspective was also the starting point in helping to understand why some individual African countries and most importantly, the African Union (AU), could, in principle, be open to embracing the Climate Change and International Security Discourse originated in the EU. Indeed, although climate change does not represent a direct existential threat to African countries as it does to low-lying small island States, the Darfur crisis pointed out how the adverse effects of the phenomenon can negatively trigger or enhance a grave humanitarian crisis and thereby contribute even more to African poverty, developmental

³¹³ See the case studies undertaken by HOMER-DIXON, *supra* Chapter 1, Section 4.2.1

³¹⁴ See for instance P. UVIN, ‘Tragedy in Rwanda: the Political Ecology of Conflict’, (1996) *Environment*, vol. 38, pp. 6-15

³¹⁵ Information on the Green Belt Movement is available at: < <http://www.greenbeltmovement.org/> >.

³¹⁶ See UNEP, ‘Sudan Post-Conflict Environment Assessment Report’, 2007, (Nairobi: UNEP), 354pp. See also the article written by UN Secretary General Ban-Ki MOON, ‘A Climate Culprit in Darfur’, 16 June 2007, *The Washington Post*, in which he states that: ‘*Amid the diverse social and political causes, the Darfur conflict began as an ecological crisis, arising at least in part from climate change. [I]t is no accident that the violence in Darfur erupted during the drought. Until then, Arab nomadic herders had lived amicably with settled farmers. A recent Atlantic Monthly article by Stephan Faris describes how black farmers would welcome herders as they crisscrossed the land, grazing their camels and sharing wells. But once the rains stopped, farmers fenced their land for fear it would be ruined by the passing herds. For the first time in memory, there was no longer enough food and water for all. Fighting broke out. By 2003, it evolved into the full-fledged tragedy we witness today.*’ Full article available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501857.html>>. This can also give a good sense of the context in which the first 2007 Security Council debate on ‘Energy, Security and Climate Change’ took place (see Chapter 3).

impasse, political instability and the trend to civil as well as violent transnational conflict that the region has been enduring for so long. Precisely when the Darfur crisis was at its peak, the African Union celebrated its 8th Forum, held in Addis Ababa (Ethiopia),³¹⁷ to specifically deal with the theme of 'Science, Technology and Scientific Research for Development', as well as to discuss 'Climate Change in Africa'.³¹⁸ Some statements delivered during the Forum by Heads of States of AU Member States indicate that approaching climate change from a security perspective was not out of hand at that moment. The statement of the President of Uganda, Yoweri Museveni, constitutes perhaps the most provocative and controversial plea in this sense, as he declared that climate change was '*an act of aggression*' and demanded compensation from developed countries for the damage caused by it.³¹⁹ Y. Museveni's declaration not only resonated among African policy-makers; he also repeated it before the UN Security Council on the occasion of the first open-doors debate on 'Energy, Security and Climate Change', held in April 2007.³²⁰ Moreover, in a milder but seemingly interesting line, the President of Tunisia affirmed, during the Forum, his '*[s]trong belief in the correlation between peace and security, on the one hand, and comprehensive sustainable development*',³²¹ and asserted his will to '*[f]ind appropriate formulas to settle African conflicts in an efficient and durable way and tackle its root causes*'.³²² These two references indicate that, by 2007, the security approach to climate change was not entirely absent from all African Union Member States, although it fell short of constituting a fully integrated part of the policy of the Union itself. Yet, within the five years that followed, the construction of a strong EU–Africa co-operative framework on renewable energy served to extend the Climate Change and International Discourse to this region.

³¹⁷ Website of the 8th Summit of the African Union, held in Addis Ababa, 22–27 January 2007, available at: <<http://www.africa-union.org/root/au/conferences/past/2007/january/summit/summit1.htm>>.

³¹⁸ The theme of the Conference was arguably connected with the preparation of the position of the African Union as a political coalition during the celebration of the 13th Conference of the Parties to the UNFCCC (COP.13/MOP.3) that was to be held at the end of the year in Bali (Indonesia).

³¹⁹ See *The Economist*, 'Global Warming in Africa: Drying up and Flooding Out', Press Release, 10 May 2007, available at: <http://www.economist.com/node/9163426?story_id=E1_JTGPQNG>.

³²⁰ Details on the 2007 UNSC meeting can be found in Chapter 3. O. BROWN, A. HAMMILL, R. McLEMAN, 'Climate Change as the New Security Threat: Implications for Africa', (2007) *International Affairs*, vol. 83, issue 6, pp. 1141-1151. J. BUTER and M. LEROY, 'The Environment and Conflict in Africa: Toward an Analytical Framework' (2008) *Conflict Trends*, vol. 4, pp 25-31; D. GARCÍA, 'The Climate Security Divide: Bridging Human and National Security in Africa', (2008) *African Security Review*, vol., 17, issue 3, pp. 2-17.

³²¹ Statement by Sine El Abidi Ben Ali, President of the Republic of Tunisia, to the 8th Ordinary Session of the Conference of the African Union Heads of State and Government, on 'Science, Technology, and Scientific Research in the Service of Development in Africa', Addis Ababa, 29 December–20 January 2007.

³²² *Ibid.*

3.2.2. *Developing Ties: Innovative Inter-Regional Co-operative Framework for Renewable Energy as a Vehicle of the Climate Change and International Security Discourse*

The 2007 Forum of the AU offered an opportunity for the European Union to set down the basis of a new framework for co-operation between the two regional organizations. Indeed, in the presentation of the starting phase of this new collaboration, Romano Prodi – acting as President of the EU – explicitly referred to climate change from a security perspective:

*'[I]t is not merely a problem of joining forces to react to **global threats**: terrorism, **climate change** and pandemics. Above all, it is a question of jointly seizing on the opportunities that the globalized world is making available. Development, migration, science, international trade, innovation, energy, the environment: these are all issues on which Europeans and Africans must work together, because they are bringing about changes from which both Africa and Europe must benefit'.³²³*

This standpoint, coupled with the adoption, by the Plenary Assembly of the African Union Forum, of the Report on the Follow-up of the 'Africa–Europe Dialogue', invites recalling the latest state of bilateral relations between the two organizations. The framework for political dialogue between the European Union and the Organization of African Unity (OAU) – forerunner of the African Union – was set in 2000, during the celebration in Cairo (Egypt) of the First EU–Africa Summit.³²⁴ Since the initiation of this new framework for inter-regional co-operation, both organizations have evolved; between 2004 and 2007, parallel processes of regional integration, transformation of the governance structure of each organization, and the adoption of new policy innovations having developed significantly. On the one hand, the European Union underwent an enlargement to include eastern European countries, which resulted in the admission of ten new EU Member States. On the other hand, 2005 was marked by the entry into force of the African Union Constitutive Act, which replaced the previous Organization of African Unity and incorporated into the re-born organization a socio-economic programme known as the New Partnership for Africa's Development (NEPAD).³²⁵ Following the African response to the challenges of the Millennium Development Goals, for 2015, and seeking to enhance sustainable development on the African continent, the European

³²³ Address by the Italian Prime Minister, Romano Prodi, to the Summit of Heads of State and Government of the African Union, Addis Ababa, 29 January 2007. [Emphasis added].

³²⁴ For a chronological summary of the long history of EU–Africa relations see: <http://eeas.europa.eu/delegations/african_union/eu_african_union/chronology/index_en.htm>.

³²⁵ Constitutive Act of the African Union, adopted on 11 July 2000 in Lomé (Togo); see also Strategic Framework of the Commission of the African Union 2004–2007, adopted in May 2007. In addition to the AU institutions, the NEPAD secretariat (*Partnership for Africa's Development*) and the Regional Economic Communities (RECs) also play a prominent role in Africa's economic integration.

Commission approved, in 2005, the EU Strategy for Africa,³²⁶ a policy instrument describing the geo-political, economic, social and environmental dynamics of the continent and unfolding the basic principles for the prospective long-term EU relations with Africa. In this document, the importance of ensuring climate change adaptation in Africa was acknowledged and conceived as an urgent necessity of Africa's development.

The aid granted by the EU to the African continent in this new framework of co-operation, seeking to materialize sustainable development, incorporated new forms of intensive co-operation in the fields of energy and climate change. This stage started off when the Climate Change and International Security Discourse was being launched in the EU. Thus, the Final Declaration of the Second 2007 EU–Africa Summit, held in Lisbon, unsurprisingly begins as follows:

*'On a global scale, we have today an increased understanding of our vital interdependence and are determined **to work together in the global arena on the key political challenges of our time, such as energy and climate change, migration or gender issues.***³²⁷

Most importantly, the concrete outcome of the Second Summit was the establishment of the Africa–EU Strategic Partnership, also known as the 'Joint Africa–EU Strategy (JAES),³²⁸ and within which the Commission of the African Union plays a key role (although the Strategy remains under the political guidance of both the AU Member States and the Chairperson of JAES, Jean Ping, it is the Commission of the African Union that acts as the principal executive arm of the Partnership).³²⁹ Based on four areas of inter-regional co-operation – peace and security, governance and human rights, trade and regional integration, and key development issues – it is in the Africa–EU Strategic Partnership framework that the first signs of

³²⁶ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – EU Strategy for Africa – Towards a Euro-African pact to accelerate Africa's development, document reference: SEC(2005)125.

³²⁷ EU Council, 'Lisbon Declaration', EU–African Summit, adopted on 7 December 2007 in Lisbon, Document reference: 16343/07. [Emphasis added].

³²⁸ Council of the European Union, 'The Africa–EU Strategic Partnership: a Joint Africa–EU Strategy', Lisbon, 9 December 2007, document reference: 16344/07. Website of the African–EU Partnership available at: <<http://www.africa-eu-partnership.org/>>. General Secretariat of the EU Council, 'The Africa–European Union Strategic Partnership: Meeting Current and Future Challenges Together', May 2011.

³²⁹ Webpage of the EU delegation to the AU, Koen Vervaeke: <<http://www.consilium.europa.eu/policies/foreign-policy/eu-special-representatives/koen-vervaeke.aspx?lang=en>>. Both the EU and the Pan-African Parliament made a Declaration on the newly established JAES. Joint Parliamentary Declaration on JAES available at: <<http://appablog.wordpress.com/2007/10/26/joint-ep-pap-statement-on-the-joint-eu-africa-strategy-to-be-adopted-by-the-eu-and-african-heads-of-state-and-government-assembled-in-lisbon-on-8-and-9-december-2007-for-the-2nd-eu-africa-summit/>>, paragraph 10.

permeability of the African continent to the Climate Change and International Security Discourse became visible. As the instrument setting up the Partnership stated:

*'[T]he Joint Strategy defines the objectives of reinforcing and elevating the EU-Africa political partnership, to jointly address global challenges such as climate change or energy security and sustainability, and to facilitate and promote a broad-based and wide-ranging people-centred partnership for all people in Africa and Europe.'*³³⁰

This general objective was translated and sub-divided into a set of Priority Areas of co-operation. The Priority Area nº 1 of the Strategy – dedicated to collaboration in the field of security and entitled 'Peace and Security: Promoting a Safer World' – began by making reference to traditional security issues, but also integrated an innovation; paragraph 25 of the Strategic Partnership openly refers to climate change as a security challenge:

*'25. [F]urthermore, over the past years a number of new global, and human security challenges have emerged, relating to issues such as climate change, environmental degradation, water management, toxic waste deposits and pandemics. There is a need for Africa and the EU to deepen their knowledge of the security challenges involved and jointly identify responses that could be formulated towards, and together with, the larger international community.'*³³¹

Besides, Priority Area nº 4 on 'Key Development Issues: Accelerating Process Towards Achievement of the Millennium Development Goals' focuses on the means of developing inter-State co-operation and private-sector investments and contains a specific sub-item on 'Environmental Sustainability and Climate Change'. Reference to the energy sector is first introduced discretely under the sub-heading 'Infrastructure', followed a few paragraphs later by an indication under the sub-heading on 'Energy', of the goals pursued in this area. Most importantly, this first direct reference to the place of the energy sector in EU–Africa co-operation, which is accompanied by a description of specific policy actions which include an important structural governance innovation: the launch of the Africa–EU Energy Partnership (AEEP). This Partnership is part of JAES and results from the latter's First Action Plan for Implementation (2008–2010), whereby the field of energy (Africa–EU Strategic Partnership, area nº 5) and that of climate change (Africa–EU Strategic Partnership, area nº 6) appear as 'distinct' and self-standing areas of co-operation.³³² In the field of peace and security (Africa–

³³⁰ *Ibid.* [Emphasis added].

³³¹ *Ibid.*, paragraph 24. [Emphasis added].

³³² The most important product of AEEP's activity was the launch of the Renewable Energy Co-operation Programme (RECP), at the First High Level Ministerial Meeting of the AEEP, held in Vienna on 14 September 2010. RECP is structured along three main axes of work: access to energy; energy security; and development of renewables and energy efficiency. This institutional innovation was part of EU

EU Strategic Partnership, area nº 1), the Plan for Implementation considers '*[r]each[ing] common positions and implement[ing] common approaches on challenges to peace and security in Africa, Europe and globally*' as Priority Action nº 1. The AEEP is implemented by its Joint Expert Group (JEG) which is composed of representatives of African and EU Member States as well as of civil society organizations. The JEG is supported by one African and one EU Implementing Team (IT), each co-ordinated by Co-Chairs selected from each side. The AEEP's Co-Chairs so far appointed to the European IT have been Austrian and – once again – German.

The Third African–EU Summit took place in Tripoli (Libya) on 29–30 November 2010 and resulted in the adoption of the Tripoli Declaration and the endorsement of the new African–EU Partnership Action Plan for the period 2011–2013. In the section entitled '*The Africa–European Union Strategic Partnership: Meeting Current and Future Challenges Together*',³³³ the Action Plan finally recognizes that the Summit '***agreed to pursue co-operation with a view to building up local resilience capacities to address the transnational security threats posed inter alia by climate change, crime and terrorism in an integrated and comprehensive manner***'.³³⁴ The incorporation within the JAES of the Climate Change and International Security Discourse was also reaffirmed and confirmed by the description of the Peace and Security Strategic Priority (sub-heading 2) on 'Common and Global Peace and Security Challenges', which holds that:³³⁵

'[W]hile today's global environment has opened up new opportunities to enhance international peace and security, it has also come with new security challenges, which in a world of increasing interdependence and close links between the internal and external aspects of security, only can be addressed through concerted international action, including in a UN context. Issues relating to transnational organised crime, international terrorism, mercenary activities, and human and drugs trafficking, as well as the illicit trade in natural resources, which are a major factor in triggering and spreading conflicts and undermining State structures, are of particular concern. [...]

Furthermore, over the past years a number of new global, and human security challenges have emerged, relating to issues such as climate change, environmental degradation, water management, toxic waste deposits and pandemics. There is a need for Africa and the EU to deepen their knowledge of the security challenges involved and jointly identify responses that could be formulated towards, and together with, the larger international community.'

policy efforts to catalyse the transition to a renewable-based society. Further information on the Africa–EU Partnership on the Energy Sector can be found at:

<http://www.africa-eu-partnership.org/partnerships/energy>.

³³³ European Union Council, '*The Africa–European Union Strategic Partnership: Meeting Current and Future Challenges Together*', EU Council Expert Series, May 2011, (Luxembourg: Publications Office of the European Union), p. 25-26.

³³⁴ *Ibid.*, p. 60. [Emphasis added].

³³⁵ *Ibid.*, p. 26. [Emphasis added].

As a result of such integration of the Climate Change and International Security Discourse, the Peace and Security Partnership mentions that an initiative seeking to transform the Discourse into concrete policy actions was to be pursued:

*'Thematic cluster sessions with experts from AU/RECs/RMs/MS/EU will be created on operational objectives in areas such as climate change and security, AU border programme, including exchange of experience, capacity building, cross-border co-operation, development of legal instruments, and disarmament issues (including Explosive Remnants of War), or focusing on geographical areas. These initiatives could lead to the organisation of Europe-Africa conferences on these themes.'*³³⁶

The circulation of the Climate Change and International Security Discourse from the EU to the most vulnerable regions – Pacific Island States and the African continent – was thus facilitated not only by the high degree of exposure of these regions to some of the worst-case scenarios of climate change impacts, but also by the dependence of these regions on European financial aid, either for climate change adaptation or, more generally, to fight against the multiple facets of economic and social shortcomings and poverty. Yet, as the case of the Maldives proves, for the Climate Change and International Security Discourse to be actually received and embraced in the most vulnerable regions, existential vulnerability and economic dependence are not sufficient conditions to trigger the circulation of the Discourse and ensure its successful incorporation. The existence of two political and institutional 'channels' is necessary for the inter-regional circulation of the Discourse to take place. It requires the political will of its creator – the EU – to share the Discourse with these regions, and the crystallization of such will through the launch of an inter-regional co-operation framework and the flow of financial aid. In the Pacific, the channel that served such a purpose was the EU–Pacific Partnership on Climate Change, associated with the creation of an innovative major financial scheme – the Global Climate Change Alliance; whereas on the African continent, the Discourse permeated through the African Union–European Union Partnership and the agenda of the African Union directly stemmed from co-operation focused on renewable-energy projects. In contrast to the permeability of the Pacific and Africa to the Climate Change and International Security Discourse, both East Asia and Latin America have seemingly remained distant from the Discourse or – at best – have had an ambiguous approach to it. To be sure, showing the existence of the Discourse in the relevant regional organizations of these areas would be easier than proving its inexistence. Yet, some factors may serve to explain the neglect of the Discourse in these regions.

³³⁶ *Ibid.*, at 85.

4. RESTRAINED ACCESS OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE TO EMERGING REGIONS: BETWEEN DISINTEREST AND RELUCTANCE

4.1. Treatment of the Climate Change and International Security Discourse in Asia: A Distant Look

4.1.1. Small Benches: Lack of an Appropriate Forum for Reception of the Climate Change and International Security Discourse

The vulnerability of the Asian continent to climate change impacts has been well described and documented in the many regional reports contracted by the promoters of the Climate Change and International Security Discourse. To be sure, Asia is not a continent benefiting from a degree of climate-change resilience as high as that of EU Member States and of the USA, and the dramatic flood scenarios that have already been experienced in coastal areas, as in Bangladesh, are vivid proofs of the vulnerability of the continent.³³⁷ Yet, the extremely large geographical extent of Asia makes it necessary to address climate change impacts through more narrow sub-regional analysis.³³⁸ The same problem arises when approaching Asian regional organizations, for it is the only region covered by the present study which does not count with an all-embracing (or truly widely embracing) regional inter-governmental organization, comparable to: the African Union (comprising all 54 African States except Morocco); the European Union (which, after the 2004 extension to include Eastern Europe, comprises 27 European Member States); the States of the Pacific Islands Forum (comprising all 12 independent Pacific Island States, the two non-self-governing territories of Niue and the Cook Islands, as well as Australia and New Zealand); the Organization of American States (comprising 35 North, Central and South American States); and the Caribbean Community (similarly comprising 15 Caribbean States and five associate members).

Thus, the main regional organizations in Asia are either confined to a specific geographical sub-region, such as the Association of South East Asian Nations (ASEAN); or have a geographical scope overlapping that of other organizations not exclusively composed of Asian countries, such as the Shanghai Co-operation Organization (SCO), which counts with Central Asian countries located at the crossroads of Europe and East Asia and which are,

³³⁷ As a low-lying county mostly spreading over the delta of the Meghna River (fed mainly by the Ganges and the Brahmaputra Rivers), Bangladesh has been identified as one of the most vulnerable countries of south-east Asia to climate change impacts; particularly in 2004, intense floods provoked the displacement of roughly 20 million people and left 30 million homeless. See, for instance, BBC NEWS, 'Bangladesh Appeals for Flood Aid', Press Release, 3 August 2004.

³³⁸ The EU contract research on the impacts of climate change on Asia is, for instance, sub-divided into two studies, one devoted to south-east Asia and the other dealing with south-west Asia.

therefore, also part of the OSCE.³³⁹ In spite of the fact that the first main obstacle to extension of the Climate Change and International Security Discourse to Asia is apparently the lack of a forum for reception of the Discourse, the treatment that these two organizations have given to the Climate Change and International Security Discourse deserves a closer examination.

4.1.2. Unfruitful Attempts: The Disinterest in Incorporating the Climate Change and International Security Discourse into the Agendas of the Association of South East Asian Nations (ASEAN) and the Shanghai Co-operation Organization (SCO)

Initially conceived as a traditional security organization, ASEAN recently began focusing controversially on non-traditional security threats and preventive diplomacy.³⁴⁰ Some signs of reception of the Climate Change and International Security Discourse might therefore be found in this organization. Some years before the Discourse entered, and was institutionalized in, the EU, the ASEAN Political and Security Community (APSC) began to open up to non-traditional forms of security, such as the Joint Declaration of ASEAN and China on Co-operation in the Field of Non-Traditional Security Issues.³⁴¹ The Joint Declaration was adopted on 4 November 2002 in Phnom Penh, Kampuchea, on the occasion of the 6th ASEAN–China Summit, presumably in the context of the rising concern about the use of force by non-State actors that spread worldwide after the 9/11 terrorist attack on New York. It is therefore not surprising that the references made in this Joint Declaration to non-traditional security threats list terrorism, but neglect to make any mention of environmental challenges. Yet, the 2008 updated list of non-traditional security threats taken into account by ASEAN did not include climate change. Most notably, the 2009 APSC Blueprint,³⁴² guided by the ASEAN Charter and setting up the programme of action in the political and security sector for the period 2009–2015, also omits any reference to climate change. Only a reference at the beginning of the document recalls the environmental components of development. Yet, the Blueprint stands

³³⁹ Some Central Asian countries are not only Member States of OSCE, but are also participating countries in ENVSEC projects (Uzbekistan, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan).

³⁴⁰ For a thorough explanation of this redirection, mapping its supporters and critics, see J. A. AMADOR, 'Asia–Pacific Regional Security Environment and Security Architecture: Choices and Prospects', Foreign Service Institute, Department of Foreign Affairs, Republic of the Philippines, online publication available at: <http://www.fsi.gov.ph/asia-pacific-regional-security-environment-and-security-architecture-choices-and-prospects/>.

³⁴¹ China–ASEAN, Joint Declaration on Co-operation in the Field of Non-Traditional Security Issues, adopted in Phnom Penh, 4 November 2002. See also the Memorandum of Understanding between the Governments of the Member States of ASEAN and the Republic of China on Co-operation in the Field of Non-Traditional Security Issues, adopted in Bangkok, 10 January 2004.

³⁴² ASEAN, Political and Security Blueprint (2009–2015), adopted by ASEAN Leaders at the 14th ASEAN Summit, 1 March 2009, in Cha-am/Hua Hin (Thailand).

expressly as a document embracing a comprehensive approach to security and consequently specifically devotes a whole section to non-traditional security threats that not only include terrorism, but also cyberspace crimes. The absence of any reference to climate change as one of the non-traditional security threats to be taken into account in the agenda of work of the ASEAN Political and Security Community is all the more striking in that the Economic Community was directly engaged with the climate change negotiations when the Blueprint was adopted. In fact, in the same year, the organization launched the ASEAN Climate Change Initiative and the ASEAN Climate Change Working Group, both created with a view to preparing a common position of the ASEAN Member States – in favour of a legally binding agreement – for the 15th Copenhagen Conference on Climate Change, held in December 2009.³⁴³

Moreover, no trace of the Climate Change and International Security Discourse is found in the ASEAN programme dealing with economic co-operation. During the First East Asia Summit, celebrated in 2006–2007, Member States of ASEAN, along with Australia, People's Republic of China, Republic of India, Japan, Republic of Korea and New Zealand, agreed to enhance the energy security of the region, and thereafter reinforced this political will by adopting on 15 January 2007 – less than a year before the celebration of the Bali Conference – the Cebu Declaration on 'East Asian Energy Security'.³⁴⁴ In this Declaration, signatory States acknowledged the urgent need to address global warming and climate change, as well as the limits of global reserves of fossil energy and the unstable world fuel-oil prices, at a time when their economic development is increasing their energy needs. The use of the notion of energy security in the Declaration relates to the acknowledgment that renewable energy and nuclear power would increasingly represent an increasing share of global supply, triggering the correlative need to strengthen the development of renewable energy and promote open trade, facilitation and co-operation in the sector and related industries.³⁴⁵ Following this line, on 7 November 2007, shortly before the celebration of the Bali Conference to be hosted by Indonesia (an ASEAN Member State) and on the occasion of the Third East Asia Summit, the ASEAN Forum adopted the Singapore Declaration on 'Climate Change, Energy and the Environment.' Despite the fact that the word 'security' was this time omitted from the title of

³⁴³ On 29 November 2009, ASEAN Member States gathered on the occasion of the Special ASEAN Ministerial Meeting on Climate Change, in Hua Hin, Thailand, where participants reflected on the progress of ongoing negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) and discussed ASEAN's common interest in and contribution to ensuring a successful and agreed outcome at Copenhagen, 7–18 December 2009.

³⁴⁴ ASEAN, Declaration on East Asian Energy Security, adopted in Cebu, 15 January 2007.

³⁴⁵ *Ibid.*, Preamble.

the Declaration, the document made direct mention of the need to 'effectively approach the inter-relatedness of energy security, climate change and development'.³⁴⁶ Its operative part called for an improvement in energy efficiency and the use of cleaner energy, including the use of renewable (or 'alternative') energy resources, based on the Cebu Declaration.

Given the similarity in the understanding of energy security between these documents and the EU position on this matter, one could have expected to find a reference to the Climate Change and International Security Discourse either in the same document or, from 2008 onwards, in other subsequent instruments adopted on the occasion of the East Asia Summit. However, much of the emphasis of the Singapore Declaration is put on the development of the mainstream climate change negotiations, so that energy security is in fact understood as part of a wider goal to enhance climate change adaptation (which requires transfer of technology for the development of renewable energies).

Only three exceptions to ASEAN's distant treatment of the Climate Change and International Security Discourse may be found. They result from limited attempts by the EU, Germany and the USA, respectively: The first exception was the celebration of the Conference organized by the Institute for Security and Development and the Institute of South East Asian Studies on 'Regional Environmental Co-operation in the EU and ASEAN: Lessons from Two Regions'.³⁴⁷ As the presentation of the Conference theme described it, the topic had been chosen because:

*'[I]t is clear that the interlinkages between **environmental problems, as a non-traditional security challenge transcending national borders**, with that of modes and mechanism of regional and global governance to effectively counter such problems remain under-researched, both in theory and in practice. Second, a comparison study on environmental policy between EU and ASEAN would be valuable not only for these two regions but for other regions which are interested in a trend of regional co-operation in this field, because ASEAN is also one of the leading regional institutions in parallel with the EU.'*³⁴⁸

The second exception is more significant, as it was not confined to the academic setting, although it remains limited in scope. In September 2011, the ASEAN Secretariat signed an Agreement with Germany to address the interface between climate change and food security.³⁴⁹ The ASEAN-German Programme – funded by Germany – on 'Response to Climate

³⁴⁶ ASEAN, Joint Declaration on Climate Change, Energy and the Environment, adopted in Singapore, 21 November 2007, paragraph 7.

³⁴⁷ Presentation and description of the theme of the Conference can be found at: <<http://www.isdp.eu/programs-a-initiatives/asia-program/asia-program-events/609-regional-environmental-co-operation-in-eu-and-asean-lessons-from-two-regions.html>>.

³⁴⁸ *Ibid.* [Emphasis added].

³⁴⁹ Full information on this project can be found at the official ASEAN website, available at: <<http://www.asean-cn.org/Item/1151.aspx>>.

Change: Agriculture, Forestry and Related Sectors (GAP-CC)' was thus agreed in principle at the 32nd SOM-AMAF Meeting, 20–21 October 2010. As a result, the 'ASEAN Multi-Sectoral Framework on Climate Change: Agriculture and Forestry towards Food Security (AFCC)' was endorsed as part of the overall efforts under the ASEAN Climate Change Initiative (ACCI), with a view to contributing to food security through sustainable use of land, forest, water and aquatic resources. Then, in 2010, Germany supported the implementation of the AFCC with three million Euros for the period 2011–2013.

The third and last exception occurred recently at a Conference on Regional Environmental Security, sponsored by the Indonesian Ministry of Environment, with the U.S. Pacific Command and ASEAN defence forces, in 2012 in Jakarta (Indonesia). The Conference dealt with *'the application of military resources and organizations to assist governments, societies and communities to mitigate environmental degradation'*.³⁵⁰ Mirroring one of the facets of U.S. understanding of the Climate Change and International Security Discourse – and undoubtedly influenced by it – the Conference sought to highlight how the specific skills of military and security services, as well as their resources in strategic planning under conditions of uncertainty, could be useful for government decision-making to provide a timely response and humanitarian assistance.³⁵¹ Nonetheless, no specific mention of climate change was apparently made.

Outside of the framework of ASEAN, it is worth noting that the consolidation of the Climate Change and International Security Discourse and its inter-regional circulation to the AU and the Pacific Islands Forum found a relative resonance in the work of the Asian Development Bank (ADB). As the area of action of this financial institution covers not only Asia but also the Pacific, references to the Climate Change and International Security Discourse can be found in some of the reports elaborated or contracted by the ADB. First, climate change and energy security – presented as a dual challenge – and concern about how climate change impacts threaten to raise food and energy prices have been mentioned ever since 2009;³⁵² both topics

³⁵⁰ See the presentation and explanation of the purposes of this event provided by Juwono Sudarsono, former Minister of Environment of Indonesia, published in The Jakarta Post, 'Defending Our Regional Environmental Security', Press Release, 10 April 2012 available at: <<http://www.thejakartapost.com/news/2012/04/10/defending-our-regional-environmental-security.html>>.

³⁵¹ *Ibid.*

³⁵² See for instance the statement by Turo KUBO (ADB's Senior Clean Energy and Climate Change Specialist, reproduced in a video on the ADB website, posted on 7 December 2009, available at: <<http://www.adb.org/news/videos/dual-challenge-energy-security-and-climate-change>>; the Press Release, dated 30 September 2009, indicating the concern of the ADB on how climate change threatens food prices and energy security in Asia is available at: <<http://www.adb.org/news/climate-change>>.

still remain present on the ADB study agenda.³⁵³ Second, the ADB acknowledged that the Climate Change and International Security Discourse had innovatively re-activated Pacific regionalism, and it also paid attention to the issue of climate-induced migration in Asia and the Pacific.³⁵⁴ Notwithstanding these references, the ADB fell short of taking on board the Climate Change and International Security Discourse (in any of its forms) or formally acknowledging the interrelatedness of climate change and international security as an independent item of its agenda. It simply recognized how such an approach had been developed in the Pacific region.

Finally, from all relevant regional organizations, the Shanghai Co-operation Organization (SCO) is perhaps the one to have most neglected to refer to the Climate Change and International Security Discourse. Five years after the creation of the SCO, in 2001, the SCO Forum was launched in Moscow, so that each SCO Member State could designate one authoritative research institution to be included in the Forum's structure and to hold the status of National Research Centre of the SCO. None of the listed national research institutions has so far made any reference to or study of the impacts of climate change on the security policies of the SCO, and this, in spite of the fact that the SCO also openly seeks to promote co-operation in non-traditional security areas.³⁵⁵ Indeed, after the recent celebration of the 6th Forum of the SCO, the Chinese delegate to SCO emphasized that the SCO was not likely to evolve into a NATO-style Asian security organization.³⁵⁶ Thus the SCO has been promoting co-operation in areas such as energy, but is also focusing on economic and social integration in the region; and, amongst its goals, the SCO seeks solutions to problems of environment,

[threatens-asias-food-prices-energy-security-population-balance-adb](#)>; as well as the keynote speech by Ursula Schaefer-Preuss, ADB Vice-President, delivered on the occasion of the 42nd Annual Meeting of the ADB Board of Governors, on 'Sustainable Land Management, Climate Change and Food Security', which is available at: <<http://www.adb.org/news/speeches/keynote-speech-sustainable-land-management-climate-change-and-food-security>>.

³⁵³ See for instance the ADB Report, 'Food Security and Climate Change in the Pacific', September 2011, ADB: *Pacific Studies Series*, 85pp.

³⁵⁴ See, for instance, the video 'When Disaster Strikes: A Look at Climate-Induced Migration', posted on the official website of the Asian Development Bank, 15 September 2011, available at: <<http://www.adb.org/news/videos/when-disaster-strikes-look-climate-induced-migration>>.

³⁵⁵ The brief Introduction on the official SCO website sets as the main goals of the organization '*strengthening mutual confidence and good-neighbourly relations among the member countries; promoting effective co-operation in politics, trade and economy, science and technology, culture as well as education, energy, transportation, tourism, environmental protection and other fields; making joint efforts to maintain and ensure peace, security and stability in the region, moving towards the establishment of a new, democratic, just and rational political and economic international order*'. See SCO homepage, available at: <<http://www.sectSCO.org/EN123/brief.asp>>.

³⁵⁶ See for instance, The Times of India, 'Shanghai Co-operation Organization will not Evolve into a NATO-Style Military Forum: China', Press Release, 7 June 2012, available at: <http://articles.timesofindia.indiatimes.com/2012-06-07/china/32100311_1_shanghai-cooperation-organisation-security-forum-china-and-russia>.

infrastructure, and education, and to build scientific and cultural links among its Member States. Despite this openness to non-traditional security issues to be dealt with by the SCO, no reference to climate change or environmental security co-operation was made in the 2007 Treaty of Long-Term Neighbourliness, Friendship and Co-operation among SCO Member States,³⁵⁷ nor in the new initiatives in new areas of co-operation, in the updating of the agenda of the organization in 2009.³⁵⁸ Only on the occasion of the 10th Anniversary of the SCO, in 2011, held soon after the Fukushima (Japan) tsunami in 2011, did SCO Member States timidly refer in the Astana Declaration to the need '*for a united action of the international community on neutralizing modern threats, including the formulation on providing timely assistance to countries affected by natural and man-made disasters*'.³⁵⁹

4.2. Treatment of the Climate Change and International Security Discourse in Latin American and the Caribbean: A Reluctant Approach

4.2.1. Reluctance in Inter-American North–South Co-operation: Heterogeneity of the Receptor Fora (OAS, CARICOM)

Akin to the distant look of East Asian regional organizations, the approach of Latin America and the Caribbean to the Climate Change and International Security Discourse can be said to be reluctant. To begin with, Latin American co-operation began in a wider Inter-American context based on North–South connections, then becoming an exclusively Latin American co-operation framework, implying that the relevant organizations of the region should consist of a range of Member States with similar positions within the mainstream climate change negotiations. This is of course particularly evident in the case of the Organization of American States (OAS). As the oldest regional organization in this region and also as the widest in scope (it includes the USA and the Caribbean), OAS deserves first examination; it is also the one where some ambiguities are most likely to be encountered, given the political influence that the USA has within the OAS, and the influence of the former

³⁵⁷ SCO, Treaty of Long-Term Good-Neighbourliness, Friendship and Co-operation between the Member States of the Shanghai Co-operation Organization, adopted in Bishkek (Kyrgyzstan), 16 August 2007.

³⁵⁸ In 2009 the SCO began collaborating with Afghanistan on combating terrorism, illicit drug trafficking and organized crime, and also launched an initiative to combat the consequences of the global financial economic crisis.

³⁵⁹ SCO, Astana Declaration of the 10th Anniversary of the Shanghai Co-operation Organization, adopted in Astana (Kazakhstan), 15 June 2010.

colonial presence of some EU countries (particularly France and the United Kingdom) in the Caribbean.³⁶⁰

Considering the institutional presence and political leverage of the USA in the OAS, the high level of vulnerability of the Caribbean island States (most of which are simultaneously members of OAS and of CARICOM), and the physical as well as political presence of the EU and EU Member States (including one of the main promoters of the Climate Change and International Security Discourse, the UK), it may not come as a surprise that some mention of environmental security can be found on the OAS's agenda. Such references are, however, bound to the specific perspective of Disaster Risk Reduction in the Caribbean.³⁶¹ As early as 2001, the OAS adopted the Statutes of the Inter-American Committee on Natural Disaster Reduction,³⁶² within which, the Caribbean Community (CARICOM) plays an important role as implementing agency of several programmes related to disaster risk-reduction, natural hazards and climate change adaptation, such as the Inter-American Network for Disaster Mitigation.³⁶³ It also oversees the development of renewable energy programmes in the Caribbean, funded both by the USA and by the EU, such as the 2008 Caribbean Sustainable Energy Programme (funded by the EU Energy Initiative), or CARICOM's participation in the 2011 Global Sustainable Energy Island Initiative (created with U.S. funds).³⁶⁴ Yet, despite this logical predisposition of the OAS to the adoption of the Climate Change and International Security Discourse, and

³⁶⁰ In fact, both former colonial powers have conserved territorial possessions in the Caribbean: France's overseas *Départements* of Guadeloupe and Martinique, as well as the overseas communities of Saint Martin and Saint Barthélemy, on the one hand (Saint Martin remaining attached to the *Département* de Guadeloupe and San Bartélémy being, since 1 January 2012, a *Pays et territoire d'outre-mer*); and the British Overseas Territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Turk and Caicos, on the other hand.

³⁶¹ Projects of the Caribbean Division on Disaster Risk Reduction are undertaken under the institutional umbrella of the OAS Department of Sustainable Development. Detailed information on these projects can be found at: <<http://www.oas.org/dsd/Caribbean/DEFAULTCPND.htm>>.

³⁶² OAS, Statutes of the Inter-American Committee on Natural Disaster Reduction, adopted 16 May 2001, document reference: CP./RES.792 (1277/01).

³⁶³ The Inter-American Network for Disaster Mitigation aims at developing partnerships and co-operation agreements which can assist OAS Member States in sharing information and knowledge and experience on management of risks stemming from natural hazards (including, but not limited to, climate change impacts). More information on the mission, founding principles and strategic objectives of the Network can be found at <<http://www.oas.org/dsd/Caribbean/Management.htm>>.

³⁶⁴ Both programmes are implemented in predominantly English-speaking Caribbean Island States. They seek to reduce both the high level of dependence on imported petroleum for their energy and their vulnerability to climate change impacts (such as sea-level rise and increased hurricane force and frequency). The Caribbean Sustainable Energy Programme is being implemented in St Lucia, Dominica, St Kitts & Nevis, St Vincent and the Grenadines, Antigua and Barbuda, Bahamas and Barbados as an observer country (further information can be found at <<http://www.oas.org/osde/reia/CSEP.htm>>; the Global Sustainable Energy Island Initiative is implemented in Dominica, Grenada, St Lucia and St Kitts & Nevis (further information available at: <<http://www.oas.org/dsd/reia/GSEII.htm>>).

notwithstanding some mention, since 2008, of the impacts of climate change on food security in the Caribbean,³⁶⁵ there has been no truly effective acceptance of the Discourse. In fact, not only does it not adopt the Discourse, the OAS actually fails to deal with climate change as a specific item at all. This can be explained by the fact that its wide membership includes Member States which have very heterogeneous interests in climate change negotiations, pertaining to different (when not opposed) political climate change coalitions (the USA belongs to the Umbrella Group, whereas all the other OAS countries are non-Annex-I countries belonging to the G-77+China group, the Latin American and Caribbean Group (GRULAC), AOSIS or ALBA). This characteristic differs from those of the EU, the AU and the Pacific Islands Forum, which either constitute a specific political coalition in climate change negotiations (EU and the AU) or are all part of the same coalition (PSIDS are all part of AOSIS).

4.2.2. Reluctance in Latin American South–South Co-operation: Competing Economic Interests and Ideological Divides (MERCOSUR, UNASUR, ALBA)

After the OAS and the CARICOM, the Latin American South–South regional co-operation through the Mercado Común del Sur (MERCOSUR, the Southern Common Market) and, more recently, through the Unión de Naciones Suramericanas (UNASUR, the Union of South American Nations) and the ALBA ought to be examined. The most prominent characteristic of these three organizations is that they focus on the areas directly linked to the regions' main concern: economic development. None of the three has a programme on security co-operation. While the issue of energy security was the object of the 2010 Treaty of South American Energy Integration in UNASUR, no reference was made to the effects that climate change impacts (or any other environmental problem) might bear upon it. The only partial concern shown by these regional organizations to the security effects of climate change may be found in MERCOSUR, which is apparently interested in the impacts of climate change on food security, as these may in turn affect the food exports, the main source of economic growth in Latin American countries. As for the recently created Alianza Bolivariana para los Pueblos de Nuestra América (ALBA, Bolivarian Alliance for the Peoples of Our America), the lack of any mention of the Climate Change and International Security Discourse may be explained by the general ideological reluctance of its Member States to assume policies associated with or stemming from the geo-strategic interests of hegemonic countries. Only

³⁶⁵ The Third CARICOM/Cuba Summit, held on 8 December 2008 at Santiago de Cuba, was indeed devoted to the theme 'Financial Crisis, Fuel and Food Security: Climate Change in Focus'. For a summary of the event, see <http://www.caricom.org/jsp/pressreleases/pres374_08.jsp>.

one manifestation of the Climate Change and International Security Discourse can be observed, close to the Venezuelan border, but limited to academic circles. It corresponds to the celebration on 22 January 2012 of a Conference on 'Climate Change and Security in the Andean Region', held at the Universidad de los Andes (Colombia) and a part of a larger succession of 'Dialogues on Climate and Security'. Unsurprisingly, the Conference was prepared by Adelphi Consult and promoted by the German Foreign Office.³⁶⁶

The restrained access to the Climate Change and International Security Discourse in East Asia, Latin America and the Caribbean can therefore be explained by two main reasons. On the one hand, although most Asian and Latin American countries belong to the category of 'non-Annex-I' countries of the UNFCCC – and may thus be considered as developing countries, with a lower resilience and adaptation capacities in facing climate change impacts than developed countries-, they are *generally* not exposed to the worst-case climate change scenarios, potentially putting at risk their existential survival as Pacific Island States paradigmatically embody. On the other hand, even when such extreme forms of vulnerability are present (as in Central America and the Caribbean when hit by cyclones and hurricanes; or as in south-east Asia, which suffers from increased delta flooding), the differing interests between the EU and the regions at stake in respect of key sectors, such as renewable energy or food exports, arguably explain the why no specific political framework of inter-regional co-operation, akin to the two EU Partnerships with the Pacific Islands Forum and the African Union, has been launched.

5. CONCLUSIONS

As J. Dryzec clearly defined it, a discourse is a shared way of apprehending the world.³⁶⁷ Forged in the realm of political power and embedded in language, discourses construct meanings and relationships; they are forms of responding to the inherent complexity and inter-relatedness of problems of all kinds – including environmental ones. Besides, to become recognizable and acquire self-standing, each new discourse needs to rely on a shared set of assumptions and contentions which help to define common sense and legitimate knowledge.³⁶⁸ This chapter has shown how the security perspectives on climate change that have emerged in international fora and research settings, far from being improvised or

³⁶⁶ Adelphi Consult, 'Climate Change and Security in the Andean Region' (23 January 2012) *Climate Security Dialogue Brief*, Universidad de los Andes, 4 pp.

³⁶⁷ J. DRYZEC, *The Politics of the Earth: Environmental Discourses*, *supra*, at 9.

³⁶⁸ *Ibid.*

fortuitous, constitute the pieces of a new way of understanding climate change, hence referred to in this thesis as the Climate Change and International Security Discourse. Although its emergence and early configuration undoubtedly benefitted from prior knowledge and experience that policy-makers and research communities had acquired about the links between environment and security, the revival of this connection was not the mere continuation of the environmental security precedent.

Born in Germany, where the core contentions, innovative language (for instance referring to climate change as a threat multiplier) and region-based methodology were settled, the Climate Change and International Security Discourse can be truly identified as such once the European Union had institutionalized it. It is from such a political cradle that legitimate knowledge on climate change and international security was reinforced through the multiplication and mushrooming of EU contract reports, elaborated by the same community which had previously been tasked by the German Government with the early formulations of the links between climate change and security. Simultaneously, as individual EU Member States (UK, Denmark and The Netherlands) mainstreamed the Climate Change and International Security Discourse in the realm of their national security strategies, more research institutions (such as the International Institute for Sustainable Development or the Royal United Services Institute) joined the pioneering ones (Ecologic Institute and, most importantly, Adelphi Consult).

These reports (along with the political will promoting their elaboration) have tailored and construed the Climate Change and International Security Discourse as a widely embracing framework under which, first of all, the manifestations of the adverse impacts of climate change (from food security to water stress, sea-level rise or the advance of desertification) are mapped in different regions of the world. Yet, what makes the specificity of the Climate Change and International Security Discourse – and permits its differentiation from related discourses on climate change adaptation and resilience – is the purpose of such a task: anticipating how those changes may exacerbate local or regional conflict and correlatively measure whether and to what extent they may modify the geo-political status of the regional organization and the Member States promoting the Discourse.

Once settled, the EU sought to consolidate the Climate Change and International Security Discourse by extending it to the OSCE and NATO areas, two regional security organizations of which it is a member, and that enabled the formalization of a transatlantic dialogue on climate change and international security with the United States. Mainstreamed in EU foreign policy and consolidated as a discursive product of hegemonic regions, the Climate

Change and International Security Discourse was then circulated to areas beyond the scope of the European Union which are extremely vulnerable to the adverse impacts of climate change. Presumably, such circulation permits downgrading of the strong geo-political footprint of the Climate Change and International Security Discourse as originally conceived, and thereby legitimizes it. The contrast between the incorporation of the Discourse into the agenda of the Pacific Islands Forum as well as into that of the African Union and its restrained acceptance in Asian and Latin American regional organizations (ASEAN, SCO, OAS, CARICOM, MERCOSUR, UNASUR and the ALBA) makes it clear that a set of conditions is required for a successful circulation to take place. First of all, the political will of the promoter of the Discourse (the EU) to circulate it to a specific organization needs to crystallize in two ways: the creation or revival of a political partnership, coupled with the association of such an inter-regional co-operation framework with a financial flow (for instance in the form of financial assistance for adaptation to climate change or investments in renewable energy projects). Secondly, the forum for the reception of the Discourse needs to fulfil some requirements. It seems important that the members of the regional organization concerned have a rather homogeneous level of vulnerability to climate change impacts and share a similar or even common position in climate change negotiations. Also, the existence of a common interest with the promoters of the Discourse or at least the absence of competing economic interests in key areas embraced by the Climate Change and International Security Discourse (such as food or energy security) is fundamental.

Mapping the construction and circulation of the Climate Change and International Security Discourse serves to understand its underlying rationale. What has yet to be discovered is whether the incorporation of the Discourse by the receptor fora of the most vulnerable regions has had an impact on its understanding, and whether such impact is discernible when the international community as a whole is confronted with the Discourse and operates beyond the regional level of analysis. The following Chapter, on the Climate Change and International Security Discourse before universal international organizations (UN organs and institutions) is therefore devoted to this question.

CHAPTER 3

THE CLIMATE CHANGE AND INTERNATIONAL SECURITY DISCOURSE IN OPERATION: INTRODUCTION AND RESIGNIFICATION IN UNIVERSAL ORGANIZATIONS

1. INTRODUCTION

2. THE UN SECURITY COUNCIL DEBATE ON 'SECURITY, ENERGY AND CLIMATE' (2007): THE FIRST ATTEMPT TO SECURITIZE CLIMATE CHANGE

2.1. 'Greening' the Security Council? Origins of the Debate in Perspective

2.1.1. Involvement of the UNSC with Environmental Issues Since the End of the Cold War: From Ecological Crimes to Sustainable Development

2.1.2. The 2007 British Proposal: Introducing the German-driven EU Climate Change and International Security Discourse to Universal Organizations

2.2. The Dividing Lines between 'Survivalism' and 'Developmentalism' as Two Irreconcilable Positions

2.2.1. Proponents of the Debate: Hegemonic and Existential 'Survivalists'

2.2.2. Opponents of the Debate: Emerging States and Their 'Developmentalist' Allies

3. THE UN GENERAL ASSEMBLY RESOLUTION ON 'CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS' (2009): A LEGITIMIZING AND EXPANSIVE MOVE

3.1. The Road to UNGA Resolution 63/281 (2009): Resignifying the Climate Change and International Security Discourse

3.1.1. The 2008 Proposal of Pacific Island States: A Shift in the Commanding Hands

3.1.2. The Adoption of the Resolution by the General Assembly: Reaching a Compromise on the Dividing Lines of the Debate

3.2. From UN Organs to UN Agencies and Institutions: Spreading the Climate Change and International Security Discourse

3.2.1. The Impact of the Copenhagen Climate Change Summit on the Climate Change and International Security Discourse

3.2.2. Intra-institutional Circulation of the Security Approach to Climate Change in UN Agencies and Institutions

4. THE SECOND SECURITY COUNCIL DEBATE ON 'MAINTAINING INTERNATIONAL PEACE AND SECURITY, CLIMATE CHANGE IMPACTS' (2011): TOWARDS A CONSOLIDATION OF THE SECURITY APPROACH TO CLIMATE CHANGE IN THE UNITED NATIONS

4.1. Back to the Security Council: The Pursuit of the German Strategy

4.1.1. Increased Awareness of Climate Change Impacts in Mainstream Climate-Change Negotiations: From Copenhagen to the Durban Climate Change Summit (2009–2011)

4.1.2. The 2011 German Proposal: A Historical Opportunity

4.2. Climate Change and International Security: A Discourse in Progress

4.2.1. Dilution of the Proponents/Opponents Divide

4.2.2. Consolidation of a New Understanding and Adoption of the 2011 Security Council Presidential Statement: Starting Point of a New Security Council Practice?

5. CONCLUSIONS

'So today is about the world recognizing that there is a security imperative, as well as economic, developmental and environmental ones, for tackling climate change and for our beginning to build a shared understanding of the relationship between energy, climate and security.'

Margaret Beckett, UK representative before the UN, Statement as Chair of the 5663rd session of the United Nations Security Council, 17 April 2007.

'More importantly, it is historic because, in the resolution, we have agreed for the first time by consensus the link between climate change and security. This is a link that is being discussed broadly in academic papers and security documents in many capitals around the world, but it is the first time that we have formally made the link here – and I think that that is very important to reflect on.'

Australian Representative, Statement before the UN General Assembly, 3 June 2009.

'Many of our countries face the single greatest security challenge of all, that is, our survival. For that reason, we have to come to the Security Council today.'

Marcus Stephen, President of Nauru, Statement before the UN Security Council, 20 July 2011.

1. INTRODUCTION

As recognized in the United Nations Charter, regional organizations play a complementary role in the achievement of the purposes of the United Nations.³⁶⁹ In practice, such relationship between regional and universal international organizations has produced a multi-coloured kaleidoscope of interactions which may depend on, inter alia, the material scope of operation of the regional organization concerned.³⁷⁰ As indicated in the preceding chapter, the Climate Change and International Security Discourse finds its roots at a regional level of analysis, which is the original locus of the underlying interests feeding both its birth and circulation, and where the political forces and linguistic innovations enabling the formulation of the grounds of the Discourse could first be unveiled. Yet, while the region may be seen as the container of the motivations intrinsic to the Climate Change and International Security Discourse, it is at a universal level that the Discourse may turn into proper action and operate as a potential trigger of changes both of a collective system of international peace and security and the mainstream international regime on climate change developed under the auspices of the United Nations General Assembly. Yet, while the regional and universal levels

³⁶⁹ The complementary role of regional arrangements is laid down in Chapter VIII of the UN Charter, Articles 52-54.

³⁷⁰ L. BOISSON DE CHAZOURNES, 'Les relations entre les organisations régionales et les organisations universelles', (2010) *Recueil des cours de l'Académie de Droit international de la Haye*, vol. 347, pp. 79-406.

of analysis remain closely connected, the introduction of the Discourse before two core organs of the United Nations – the UN Security Council (UNSC) and the UN General Assembly (UNGA) – can be understood as an autonomous and distinct process. **How has the Climate Change and International Security Discourse been resignified before universal organizations and which legal consequences can be inferred from such evolution?**

The present Chapter argues that it is at the universal level – where the Discourse is confronted with a full-fledged multilateral environment – that the usefulness of circulating the Discourse to the most vulnerable regions becomes more visible. As they supported the Discourse before universal organizations, these partners helped to legitimize the set of contentions embraced by the Climate Change and International Security Discourse and, most importantly, participated in the evolution of its content – from a hegemonic-led strategy consisting of geo-political concerns to the translation of an existential plea into policy.

The present Chapter therefore completes the reconstruction of the Climate Change and International Security Discourse initiated in Chapter 2, establishing the connection between the universal levels of analysis of the Climate Change and International Security Discourse when analysing the operation of the Discourse and its legal consequences stemming from the reactions of UN Member States to the Discourse before UN organs. Each Section is thus devoted to the successive landmark moments when UN Member States were called upon to discuss the Climate Change and International Security Discourse in the two core UN organs. Each time, the task was approached under a different title and gave rise to a different political and legal reaction of the organization.

Section 2 begins with the moment in which the Discourse was introduced for the first time, in 2007, before the UN Security Council, and provides a detailed explanation of the dividing lines of the debate between the proponents and opponents of the Discourse. Section 3 then describes the follow-up of this first attempt which, after a shift in the commanding hands of the Discourse, continued its evolution and was resignified in 2009 before the UN General Assembly. Throughout this reconstructive effort, particular attention will be paid to the influence that the strong political momentum created by the on-going negotiations on the future of the climate-change regime may have had on the evolution of the Climate Change and International Security Discourse and its resignification before UN organs. Points of convergence and divergence between the Discourse and the mainstream UNFCCC–KP track will be highlighted in terms of the content, procedure and political alliances arising in each of them. Section 4 covers the return of the Climate Change and International Security Discourse before the UN Security Council, which marks a step towards the future consolidation of the

Discourse in the UN system. As short as the history of the Climate Change and International Security Discourse may be, the force of the plea that it contains and the seriousness of the problems it encompasses invites the extraction of not only policy (and philosophical) reflections, but also of the legal consequences of this process. The fundamental legal question lying behind the Climate Change and International Security Discourse, as understood nowadays in universal organizations, will be disclosed.

2. THE UN SECURITY COUNCIL DEBATE ON 'SECURITY, ENERGY AND CLIMATE' (2007): THE FIRST ATTEMPT TO SECURITIZE CLIMATE CHANGE

2.1. 'Greening' the Security Council? Origins of the Debate in Perspective

2.1.1. Involvement of the UNSC with Environmental Issues since the End of the Cold War: From Ecological Crimes to Sustainable Development

The debate on 17 April 2007 on such an innovative, multidimensional and rather controversial topic as 'Energy, Security and Climate' before the UN Security Council deserves analysis against the background of the Council's history of involvement with environmental matters, particularly since the disintegration of the Soviet Union in 1991 put an end to the dormant period in which the Council had been imprisoned for forty years.³⁷¹ Finally able to assume the primary responsibility for the maintenance of international peace and security, originally assigned by Article 24 of the UN Charter, and take decisions binding upon Member States under Article 25, from 1991 onwards, the Security Council became more active than at any time before in the history of the United Nations. Yet, as the use by the Security Council of its powers to respond to threats to peace, breaches of the peace and acts of aggression blossomed, Christine Gray recalls, the original Charter scheme was transformed.³⁷² Indeed, whilst the contest between competing models became diluted – described by Yoshio F. Fukuyama as the 'end of history'³⁷³ – and a new era governed by a 'global standard' was initiated, the Security Council was confronted with a new challenge, that of integrating new elements of social justice into its realm of action.³⁷⁴ Henceforth, despite having been set up to keep the peace and not to change the world order, the practice of the Security Council after

³⁷¹ C. GRAY, *International Law and the Use of Force*, 2008, 3rd ed., (Oxford: Oxford University Press), at 254.

³⁷² C. GRAY, *supra*, at 255.

³⁷³ Y. F. FUKUYAMA, 'The End of History', (summer 1986) *The National Interest*, vol. 16, pp. 3-18. This essay was later on expanded by Fukuyama in his book, *The End of History and the Last Man*, 1992, (London: Penguin Books).

³⁷⁴ M. KOSKENNIEMI, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View', (1995) *European Journal of International Law*, vol. 6, issue 1, pp. 325-358, at 325.

1991 on when and how to act was soon characterized by a willingness to use its exceptionally 'hard' powers to address 'soft' purposes and the correlative widening of its scope of action.³⁷⁵

The embrace by the Council of new factual realities – based, as Marti Koskenniemi highlights, on the idea that a State is not only a territorial unit but also embodies a set of institutions and values,³⁷⁶ – operated mainly through a free-ranging of what counts as a 'threat to international peace and security' under Article 39.³⁷⁷ Through the broadening of its interpretation, the Security Council seems to have shifted from a traditionally 'negative' understanding of peace – narrowly defined as the absence of armed conflict within and among States – towards the adoption of a 'positive' definition of peace – embracing the existence of friendly relations between States and of the economic, social, political and environmental conditions necessary for a lasting conflict-free society.³⁷⁸ Erika de Wet recalls how the Statement of the President of the Security Council indicated that such a possibility was regarded in 1991–1992, when he contended (on behalf of the Council) that *'the absence of war and military conflicts amongst States did not itself ensure international peace and security'*, and thus acknowledged that *'the non-military sources of instability in the economic, social, humanitarian and the ecological fields have become threats to international peace and security.'*³⁷⁹

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*, at 432. Koskenniemi also adds that: *'These institutions or ideas may be subject to a wide variety of partly internal, partly external, political, ideological or economic threats that are no less dangerous to the State's identity or viability than clear-cut military threats against its territory.'*

³⁷⁷ Before the Security Council decides to impose military or non-military enforcement measures under Articles 40, 41 or 42 of the UN Charter, it must determine the existence of a threat to peace, breach of the peace or act of aggression, as defined in Article 39. The qualification of a situation as constituting any of these three categories (also referred to as criteria) belongs to the discretionary power of the Security Council. Its judgment is based on factual findings and political considerations and is not easily measured by purely legal criteria. Hence, the nature of this discretion and the existence of limitations to it remains a very controversial issue. Since 1991, the Security Council has opened this category to incorporate situations, irrespective of whether they risked destabilizing international relations, that required action by the Council in order to, inter alia: respond to grave internal humanitarian crisis (Somalia, 1992); halt widespread and systematic human rights violations (FRY, 1993); support democratic governance (Haiti and Angola, 1993; East Timor, 1999); or act de facto as a judicial forum for non-State actors like terrorists (Libya – Lockerbie case, 1992; Sudan 1996).

³⁷⁸ E. DE WET, *'The Chapter VII Powers of the United Nations Security Council'* (2004) (Oxford: Hart Publishing), at 140. Again, this division mirrors Johan Galtung's seminal article on the distinction between 'positive peace and negative peace' that he laid down in 1969 for the first editorial of the Journal of Peace Research. See, GALTUNG, supra Chapter 1, note 59. The evolution within the Council towards an embracement of the positive definition of peace mirrors the widespread criticism of the traditional conception of security that simultaneously emerged later with the Cold War and resulted in the broadening and deepening movements of International Security Studies (such as the Copenhagen and the Welsh Schools). See Chapter 1, Section 4.1.

³⁷⁹ UN Security Council, S/PV.3046, Presidential Statement of the Security Council, adopted on 31 January 1992, at 143. The new tendency of the Security Council was also reflected in: Security Council

Although the responsibility to maintain international peace and security contains an inherently preventive component, the possibility that the Council could begin dealing with long-term and structural causes of threats to peace – including environmental stress – which might not directly result in an international armed conflict, soon became highly controversial. Opponents of this move to enlarge the original intention of the Discourse, such as Catherine Tinker, criticized it for neglecting the limitations imposed on the Council by its composition and structure, and for deviating too much from the functions that the Council had been originally designed for. So, while the General Assembly was reified as the appropriate forum for dealing with long-term socio-economic issues, the use of Chapter VII powers of the Security Council regarding environmental matters was depicted as highly inappropriate, rather ineffective and even possibly counterproductive.³⁸⁰ In contrast, supporters of this shift, such as Brendan Reilly, viewed this criticism as a rather idealized normative position of international law, and contended that there is at least a residual role for the Security Council in cases of failure of international compliance with environmental-protection objectives that ultimately seek to halt gradual annihilation.³⁸¹ In practice, the action of the Security Council over the last twenty years seems to indicate that none of these positions has become predominant; while falling short of pursuing a self-standing 'environmental security' trend that would continue the precedent opened up in the Cold War era, some indirect consideration has been given to environmental issues as part of the action of the Security Council.

The first stage of the involvement of the Security Council with environmental issues relates to environmental damage caused during an armed conflict. In 1991, Security Council Resolution 687, for the first time, declared the State of Iraq liable for environmental harm and depletion of natural resources resulting from the burning of Kuwaiti oil platforms during the

Summit, Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, document reference: UN Doc S/23500 (1992); and on the Report of the Secretary-General on an Agenda for Peace – Preventive Diplomacy, Peace-making and Peace-building, document reference: UN Doc S/24111 (1992).

³⁸⁰ See for instance C. TINKER, 'Environmental Security in the United Nations: Not a Matter for the Security Council' (1991-1992) *Tennessee Law Review*, vol. 59, pp. 787-801, at 794: '*Sending in military troops under United Nations auspices to prevent trees being cut or to stop the building of a factory using polluting technology is clearly inappropriate and may itself be a threat to international peace and security.*' Erika de Wet supports this critique, as she contends that the Security Council is '*a reactionary organ that is not equipped to attempt the prevention of all possible long-term tensions*', E. de WET, *supra*, at 139. These critiques eventually grew so much that, following the establishment of the Sanctions Committee, it was tantamount to a major constitutional crisis of the Security Council. Legal and institutional limitations to the power of this organ were sought thereafter (e.g. the applicability of *ius cogens* obligations to Security Council decisions and the possibility of judicial review of Security Council decisions).

³⁸¹ Contra, B. REILLY, 'Clear and Present Danger: a Role for the United Nations Security Council in Protecting the Global Environment', (1995-1996), *Melbourne University Law Review*, vol. 20, at 763.

Second Gulf War. This wrongful act was characterized by the Council as a breach of international humanitarian law by the State of Iraq. Although harm to the environment was not the original act of aggression that had triggered the response measures of the Security Council, it did indicate the willingness of the Council to recognize environmental harm in the context of action undertaken under Chapter VII of the UN Charter. The Council thereafter decided the compulsory compensation of such environmental damage and set up a Compensation Commission for that purpose.³⁸²

Outside the framework of armed conflicts, the second stage is connected to the progressive inclusion of development as a factor to be taken into consideration. As Aris Constantinides explains, the 'securitization of development' began once, under the weight of globalization, the artificial divide that used to keep development policies locked in the realm of domestic socio-economic issues faded.³⁸³ On the one hand, the Security Council was influenced by the move from military security to a holistic conceptualization of human security that the United Nations Development Programme brought to the fore in 1994.³⁸⁴ On the other hand, the development of a better understanding of the political economy of armed conflicts – particularly focused on how competing access to natural resources for exploitation increases the risk of regional instability – was accompanied by the shift from peace-keeping to the concept of peace-building. Such novelty, A. Constantinides explains, came to suggest '*a more integrated approach to the range of issues that threatened peace and security*'.³⁸⁵

The approach of the Security Council to development had two main consequences. First, it permitted reactivation of development aid levels which, as a result of the disconnection between development aid and the geo-political interest of donor States during the Cold War, had dramatically decreased during the 1990s.³⁸⁶ Secondly, it greatly enhanced the development of the preventive action of the Council, particularly fostered by the UN Secretary-General's 1998 Report on 'The Causes of Conflict and the Promotion of Durable Peace in Africa'. Ever since then, instead of reserving Security Council action for control and

³⁸² UNSC Res. 687, adopted on 3 April 1991, 2981st meeting. See also L. HENKIN and R.BILDER, 'Yesterday's Politics, Tomorrow's Problems: a World without the United Nations?' (1995) *Melbourne University Law Review*, vol. 20, issue 1, pp. 16-34, at 16.

³⁸³ A. CONSTANTINIDES, 'Securitizing Development: Advantages and Pitfalls of the Security Council's Involvement with Development Issues', in C. ERIKSEN and M. EMBERLAND, *The New International law: An Anthology*, 2010, (Leiden: Martinus Nijhoff), pp. 202-219.

³⁸⁴ United Nations Development Programme, *Human Development Report 1994*, 1994, (New York: Oxford University Press) at 24.

³⁸⁵ *Ibid.*, at 206. See also N. TSCHIRGI, 'Security and Development Policies: Untangling the Relationship', in S. KLINGEBIEL (ed.) *New Interfaces between Security and Development*, 2006, (Bonn: Deutsches Institut für Entwicklungspolitik), at 48.

³⁸⁶ A. CONSTANTINIDES, *supra*, at 207.

management of unstable situations, the focus was increasingly turned towards the *drivers* or *root causes* of instability, including poverty.³⁸⁷ Such a shift became particularly visible after adoption of the 2005 Declaration on ‘Strengthening the Council’s Role in Conflict Prevention – Particularly in Africa’.³⁸⁸ Interestingly, the Declaration also shows how the notion of development progressively dealt with by the Security Council was not understood in restrictive terms limited to *economic* development. Rather, it embraced *social* and *human* development which goes hand in hand with the idea of long-term environmental sustainability. Henceforth, acknowledging the need to adopt a broad strategy of conflict-prevention that takes into account non-military issues, paragraph 6 of the Declaration held that the Council should address:

*‘[T]he root causes of armed conflict and political and social crisis in a comprehensive manner, including by **promoting sustainable development**, poverty eradication, national reconciliation, good governance, democracy, gender equality, the rule of law and respect for and protection of human rights’.*³⁸⁹

Reference to sustainable development – understood, as defined by the Brundtland Report, as ‘*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’³⁹⁰ – is restated in the operative part of the Declaration, stating the Council’s determination to strengthen UN conflict-prevention capacities by ‘*helping to enhance durable institutions conducive to peace, stability and sustainable development*’.³⁹¹

The progressive securitization of development – and, by extension, of sustainable development – constitutes the most immediate background reference to the debate on

³⁸⁷ Report of the UN Secretary-General, ‘The Causes of Conflict and the Promotion of Durable Peace in Africa’, document reference: A/52/871- S/1998/318, 13 April 1998. In this Report, the promotion of ‘sustainable development’ is included in a separate item as one factor in the pursuit of building durable peace on the African continent. Yet, considering Africa’s reality, the focus seems to be put more on the ‘developmental’ dimension of sustainable development rather than on its environmental dimension. Development is thus referred to as ‘*a human right, and the principal long-term objective of all countries in Africa. Development is also central to the prospects for reducing conflict in Africa. A number of African States have made good progress towards sustainable development in recent years, but others continue to struggle. Poor economic performance or inequitable development have resulted in a near-permanent economic crisis for some States, greatly exacerbating internal tensions and greatly diminishing their capacity to respond to those*’, at 19, paragraph 79.

³⁸⁸ UNSC Res. 1625, Declaration on Strengthening the Effectiveness of the Security Council’s Role in Conflict Prevention – Particularly in Africa, document reference: S/RES/1625, adopted on 14 September 2005, 5261st meeting.

³⁸⁹ *Ibid.*, paragraph 6. [Emphasis added].

³⁹⁰ See Report of the World Commission on Environment and Development, ‘Our Common Future’, endorsed by the General Assembly in UNGA Res. 42/187, document reference: A/RES/42/1987, adopted on 11 December 1987, 96th plenary meeting), at Chapter 2, p. 37, paragraph 1.

³⁹¹ UNSC Res. 1625, *supra*, paragraph 2(g).

‘Energy, Security and Climate’. It is thus part of the contextual framework in which the debate took place and helps in understanding how it was ever possible to suggest holding such a debate. Since the drivers of instability and root causes of conflict became part of the Council’s sphere of action in the late-1990s, the link between development and security was acknowledged in this organ. The next stage, seemingly opened by the debate, sought to take a step forward in linking security to two intertwined areas closely related to development. As an essential element of developmental policies, energy was therefore addressed jointly with climate change, a phenomenon which in turn may affect both security and energy access in different ways. On the one hand, climate change impacts are obstacles to secure access to energy sources; on the other, international co-operation on climate change mitigation affects global energy-consumption patterns. Yet, the contextual framework of the debate cannot be limited to explanations of the stage of evolution of the Security Council practice at the time; for the narratives of the debate to be disentangled, the influence of and reference to the stage of the climate change negotiations and the political coalitions existing therein must also be tackled.

2.1.2. The 2007 British Proposal: Introducing the German-Driven EU Climate Change and International Security Discourse to Universal Organizations

Fifteen years after the grounds of the international regime on climate change had been established, with the adoption of the UNFCCC, and ten years after the ‘belly’ of such a common basic framework had been filled with detailed mitigation target obligations by the Kyoto Protocol,³⁹² the international community was constrained to begin envisioning, once again, what the future of international co-operation on climate change would look like. The opening of a new phase in the long and complex history of climate change negotiation took place barely two years after the entry into force of the Kyoto Protocol; in December 2007, 192 UNFCCC Member States were called to gather in Bali (Indonesia) for the 13th Conference of the Parties/3rd Meeting of the Parties (COP.13/MP.3). An important part of the diplomatic efforts during that year was undoubtedly centred on the preparation of the Bali Summit, which included the reception of the updated scientific findings of the IPCC 4th Assessment Report.

³⁹² The structure of the UNFCCC generally explained as being constituted by a hard ‘framework’ – setting up the skeletal form of the multilateral environmental agreement – with a ‘soft belly’ – that allows ‘breathing space for the normativity to harden alongside emergence of consensus in the evolution of a particular regime’, See B. BESAI, *Multilateral Environmental Agreement: Legal Status of the Secretariats*, 2010, (Cambridge, UK: Cambridge University Press), at 77.

It was precisely on 3 April 2007 – the day before the publication of the 4th Assessment Report – that Security Council Member States agreed to hold a debate on ‘Energy, Security and Climate’. The proposal to hold it had been filed by the United Kingdom, which had joined the EU Steering Committee on Climate Change and International Security a few months earlier and, benefitting from its status of permanent member of the Security Council, with this action formally became the driver and ambassador of the Climate Change and International Security Discourse before universal international organizations. Following the acceptance of the Security Council, the UK submitted a letter to the President of the Council in which the terms and general framework of the debate were laid down.³⁹³ The UK concept paper, as the document was referred to, introduced the topic by positing the existence of a ‘shared dilemma’ – the consumption of fossil fuels needed for the growth of economies will accelerate climate change, a phenomenon which in turn presented risks harmful to the very security the Security Council was trying to build.³⁹⁴ The concept paper also established that the aim of the debate would be to *‘rais[e] awareness of a set of significant future security risks as a result of failing to resolve the dilemma’*³⁹⁵. Recalling Security Council Resolution 1625, the UK concept paper expressly located the debate on energy, security and climate change within the pre-existing trend in Security Council practice of securitizing development and developing a broad and integrated conflict-prevention strategy.³⁹⁶ Most importantly, while climate change fell short of being referred to as a ‘threat to international peace and security’, either as a ‘root cause’ of conflict or even as a self-standing ‘driver of conflict’, the UK concept paper sought to justify the introduction of this issue into the agenda of the Security Council by highlighting the impacts that a changing climate may have on *other* ‘potential drivers of conflict’ (such as access to energy, water, food and other scarce resources, population movements and border disputes).³⁹⁷ The ***‘cumulative impacts of climate change’***, the paper held, ***‘could exacerbate these drivers of conflict, and particularly increase the risk of those States already susceptible of conflict’***.³⁹⁸ Quite strikingly, the conceptualization of the security implications of climate change was approached with a doubly doubtful wording and great causal distance from the

³⁹³ A/2007/186, Letter dated 5 April 2007 from the Permanent Representative of the UK of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, and its Annex ‘Energy, Security and Climate’.

³⁹⁴ *Ibid.*, paragraphs 1-2.

³⁹⁵ *Ibid.*, paragraph 2.

³⁹⁶ *Ibid.*, paragraph 4. Besides, one of the questions suggested at the end of the concept paper as issues to be discussed during the debate was whether climate-related factors should be increased as part of the Council’s trend to develop a more integrated policy on conflict prevention.

³⁹⁷ *Ibid.*, paragraph 3.

³⁹⁸ *Ibid.*, paragraph 9. [Emphasis included in the original document].

eventual – if ever – outbreak of conflict, for only the **accumulation** of climate change impacts **may** increase the **drivers** of conflict. However, possibly to counterbalance such controversial conceptual and causal weakness, the concept paper presented an overall exploration of the security implications of a changing climate in six concrete areas of international peace and security, more familiar to Security Council practice and which somehow add a tangible dimension to the initiative proposed – border disputes, migration, energy supplies, other resource shortage, societal stress and humanitarian crisis.³⁹⁹

The choice of the timing to hold such debate was neither spontaneous nor casual; originated and incentivized by the beginning of the institutionalization of the Climate Change and International Security Discourse in the EU, the UK initiative was arguably filed at a time when it would count with the developments of the IPCC 4th Assessment Report, a solid scientific foundation that could help to provide the basis for the appropriateness of dealing with climate change from a security perspective. As soon as the UK concept paper was submitted, opposition was raised, giving a preliminary image of the dividing lines to be set during the debate at the Security Council. On 12 April 2007, Cuba replied on behalf of the non-aligned movement to the overall proposal as well as to the details contained in the concept paper. The Cuban letter highlighted the risk of encroachment by the Security Council on the functions and powers of both the General Assembly and its subsidiary organs, such as the Economic and Social Council (ECOSOC), and strongly affirmed the view that the appropriate framework to deal with this issue was, if any, the UNFCCC Conference of the Parties. Thus, while acknowledging the existence of new and emerging threats and challenges to international security, the letter insisted on the importance of co-operation among *all* principal organs on these issues. The reaction of the G77+China group, represented by Pakistan, partly mirrored the preliminary position of the non-aligned movement. The letter of Pakistan to the President of the Security Council, dated 16 April 2007, also criticized the attempt by sponsors and supporters of the debate to drive the Council towards an encroachment on the roles and responsibilities of ‘other organs’, although the General Assembly was not specifically mentioned. However, the G77+China group – a heterogeneous but highly important political coalition in the negotiations of the international regime on climate change – added an argument which helped to back up this position. Indeed, it highlighted the view that the most vital ‘purpose’ or ‘goal’ to which energy and climate ought to be linked is not security but, primarily, sustainable development; and it stressed the fact that such was the understanding

³⁹⁹ *Ibid.*, paragraphs 7-10.

that had been previously acknowledged in the 2005–2006 Millennium Development Goals.⁴⁰⁰ Therefore, the Cuban letter continued, the issue fell within the mandates of the Commission for Sustainable Development, the Economic and Social Council (ECOSOC), the United Nations Environment Programme (UNEP), and also – albeit indirectly – the UNFCCC Conference of the Parties. At no point, the letter stressed, had the General Assembly recognized the existence of such a ‘most prominent’ link between climate change and security or of a role for the Security Council within it either. Therefore, the opposing voices from the developing world fundamentally laid down two interrelated arguments for their preliminary objections. The substantive objection repealed the initiative seeking to link climate change and security, and, in contrast, defended the traditional concept of climate change as a matter intertwined with the right to development.⁴⁰¹ The procedural objection in turn stressed the inappropriateness of the Security Council as a forum for dealing with climate change at all. The Cuban and Pakistani letters already conveyed a scent of how the debate would evolve.

On 17 April 2007, the debate was opened and chaired by the British delegate, M. Beckett. Despite the rule that Security Council debates are in principle reserved for its fifteen Member States, an important number of non-Member States requested the SC’s agreement to their participation in the 2007 debate.⁴⁰² During the Cold War, this used to be a rather common formula; as the inactivity of the Security Council blurred the original divide between the General Assembly and the Security Council set up in the UN Charter, many States not members of the Security Council chose to address this organ to set out their positions. Curiously enough, C. Gray recalls how developed countries such as France, Australia and – most prominently, the UK – repeatedly complained against this political strategy, for inappropriately seeking to turn the Security Council into a ‘mini-General Assembly’. While France reacted against the growing tendency to transform the debates of the Security Council – in principle, action-oriented – into a forum of presentation, the UK contended that speeches before the Security Council should preferably be delivered by Member States or, at best, by

⁴⁰⁰ Indeed, in the 2006 Report on the Millennium Development Goals, energy use and the rise of CO₂ emissions are both dealt with within Goal n°7, entitled ‘Ensuring Environmental Sustainability’ and which main target is to ‘*integrate the principles of sustainable development into country policies and programmes and reserve the loss of environmental resources*’. See United Nations Secretariat, Millennium Development Goals Report, June 2006, (New York: UN Department on Economic and Social Affairs), pp. 16-17.

⁴⁰¹ See Introduction, *supra*.

⁴⁰² On participation of non-Member States, see UN Charter, Articles 32, 34, 35. See also S. BAILEY and S. DAWS, *The Procedure of the UN Security Council*, 1998, 3rd ed., (Oxford, New York: Oxford University Press), at 154.

non-Member States especially affected by the issue at stake.⁴⁰³ In recent years though, since the Security Council and the General Assembly reacquired the capacity to fulfil most of their respective original functions, it is developing countries which are now reluctant to approve the holding of open debates at the Security Council and have expressed concern about the risk of encroachment on the attributions of the General Assembly. This shift provides the background against which the fact that the proposal to hold the debate was filed by the UK and that the G77+China group and the Non-Aligned Movement immediately (perhaps almost pre-emptively) reacted against it can be explained.

On 17 April 2007, the Security Council was presided by the UK and comprised its five permanent members – UK, USA, France, Russian Federation and People's Republic of China – and its ten non-permanent members – Belgium, Democratic Republic of Congo, Ghana, Indonesia, Italy, Panama, Peru, Qatar, Slovakia and South Africa. The petition for participation without right to vote was also granted to thirty-eight non-Member States, pursuant to Article 37 of the Security Council Provisional Rules of Procedure.⁴⁰⁴ After formally opening the debate, the British chair introduced the UK concept paper and, in response to the preliminary reactions of the G77+China group and of the Non-Aligned Movement, tried to present the purpose of the debate as a mere beginning of a shared understanding of the relationship between energy, climate and security, in no case '*seeking to pre-empt the authority of those institutions and processes where action is being decided*'.⁴⁰⁵ The floor was then opened to more than fifty States which participated in a heated debate. The arguments expressed therein, in favour and against initiating an approach to climate, energy and security as intertwined issues, can be divided in two main groups. On the one hand, a group of States recognized and focused on the existential threat that climate change impacts entail and placed this consideration above any possible objection regarding the suitability of the forum; the rationale behind this group's position is hereafter referred to as 'survivalism'. Another group of States stuck to the mainstream conception of climate change primarily as an environmental issue closely linked to development and rejected any idea of 'corrupting' such a conception by approaching climate change and energy issues behind the dark veil of security policy; the rationale behind this group's position is hereafter referred to as 'developmentalism'.⁴⁰⁶

⁴⁰³ C. GRAY, *supra*, at 261, citing UNSC's 2713th meeting (1986).

⁴⁰⁴ UN Security Council, document reference: S/PV.5663, 17 April 2007 (10 a.m.), at 2.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Although this division is my own, the terms and general understanding of each of these positions have been inspired by John Dryzek's explanation of the different political movements on environmentalism. J. DRYZEK, *The Politics of the Earth: Environmental Discourses*, *supra*.

2.2. The Dividing Lines between 'Survivalism' and 'Developmentalism' as Two Irreconcilable Positions

2.2.1. Proponents of the Debate: Hegemonic and Existential 'Survivalists'

Despite the fact that proponents and supporters of the holding of the debate and the main contentions laid down in the UK concept paper may be put under the same umbrella, the group of survivalist States can be sub-divided and understood as the conjunction of two trends. In tune with the explanation given in Chapter 2, these two trends correspond essentially to the alliance between the hegemonic group of States, where the Climate Change and International Security Discourse was born, with the most vulnerable countries, where the Discourse was circulated.

As the study of the construction of the Climate Change and International Security Discourse revealed, the core of the hegemonic survival discourse is the fear that adverse impacts of climate change may undermine the access of hegemonic regions to energy sources and their correlative absolute and relative geo-political position. Former UN Secretary-General Kofi Annan understood the underlying rationale of the debate in this sense and explicitly supported it.⁴⁰⁷ Then, when speaking on behalf of the British government – and not in its capacity of President of the Council – in the UK set-up, the foundation of the debate based on climate change was seen as a '*threat multiplier for instability*'⁴⁰⁸, an expression notably more precise than the terms used in the UK concept paper apparently drawn from the 2007 WBGU Report on 'Climate Change and Security' and accompanied by a direct reference to the Report of the U.S. Center for Naval Studies (CNA) reproducing the same term and which had been released the day before the debate was held.⁴⁰⁹ Such characterization was justified by observable facts (not predictions) for, as the UK delegate held, there is '*widespread recognition that there are significant links clearly being experienced by some countries*'.⁴¹⁰ Characterizing climate change as a threat multiplier carried one main consequence; in response to the substantive preliminary objection expressed during the debate by the G77+China group and

⁴⁰⁷ S/PV. 5663, *supra*, at 13. The Secretary-General stated: '*today, the uninterrupted supply of fuels and minerals is a key element in geopolitical considerations (...) and, as the Council points out today, issues of energy and climate change can have implications for peace and security*'. [Emphasis added].

⁴⁰⁸ *Ibid.*, at 18.

⁴⁰⁹ See the Report by the German Advisory Council on Global Change (WBGU), 'World in Transition: Climate Change as a Security Risk', Summary for Policy-Makers', 29 May 2007, Berlin, pp. 1-13.; as well as that of CNA Analysis & Solutions, 'National Security and the Threat of Climate Change', 2007. Both reports are commented on in Chapter 2 above, Section. 2.2.1

⁴¹⁰ S/PV.5663, *supra*, at 18.

the Non-Aligned Movement – stressing that climate change was primarily (if not exclusively) an environmental issue connected with development – the UK argued that re-consideration of ‘*a new kind of sustainable development*’ was required.⁴¹¹ It also made a plea for multilateral action and international co-operation on this matter, considering that not only is climate change a matter falling within the realm of security, but one that required the involvement of the international community as a whole, given that ‘*it is not a matter of narrow national security. It has a new dimension. It is about our collective security in a fragile and increasingly interdependent world.*’⁴¹²

The leadership exercised by the UK within the Security Council did not completely replace the driving role that Germany had previously endeavoured to play – and pursued – in the institutionalization of the Climate Change and International Security Discourse in EU institutions. Despite being a non-Member State of the Security Council, Germany spoke on behalf of the EU. Curiously enough, no reference was made in the German statement to climate change as a threat multiplier, despite the fact that the term originated in this country.⁴¹³ Climate change was instead qualified – with a terminology more familiar in recent Security Council practice on conflict prevention – as ‘*an increasingly important factor among root causes of conflict*’.⁴¹⁴ After recalling the EU position at the climate change negotiations and referring to the progress made in the EU towards the completion of the energy transition, Germany highlighted three concrete policy consequences stemming from the recognition of climate change as an issue relevant to the realm of security: the need to establish a global framework of risk management, the development of the climate change adaptation concept and the enhancement of research on the security effects of climate change.⁴¹⁵ The striking detachment of these proposals from the regular kinds of actions considered by the Security Council may suggest that the underlying long-term purpose of the proponents of the debate was to exercise political pressure in view of the celebration of the Bali Summit.

Other EU Member States seemingly followed the German example. For instance, The Netherlands expressed a rather moderate position in favour of the debate. Openly acknowledging the connection between climate change, peace and security – altogether conceived as ‘*global public goods of crucial importance*’⁴¹⁶ – The Netherlands considered that a

⁴¹¹ *Ibid.*, at 19.

⁴¹² *Ibid.*, at 19.

⁴¹³ See Chapter 2, Section 2.1.1.

⁴¹⁴ S/PV.5663, *supra*, at 20. [Emphasis added].

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*, at 21.

reassessment of the security risks was necessary for taking adequate preventive and corrective measures.⁴¹⁷ Likewise, Belgium argued that the scope of security policies ought to be reconsidered by using a broader concept of security and calling for a shift in international climate change co-operation *'from management to prevention'*,⁴¹⁸ and argued that environmental co-operation should be used *'as an instrument for conflict prevention and as a confidence-building measure'*.⁴¹⁹ This idea reminds us of the underlying rationale of the early projects of the OSCE Environment and Security Initiative conducted in the Caspian Sea.⁴²⁰ Also, in contrast to the silence and inactivity shown during the institutionalization of the Climate Change and International Security Discourse in the EU, the French delegate was active during the debate and partly shared the position of France's European counterparts before the Security Council. Recalling that the depletion of natural resources due to climate change plays a major role in conflicts, particularly in Africa, the delegate began by recognizing that *'climate change threats are real threats'*.⁴²¹ From this basis, the French delegate moved on to eloquently characterize climate change as one of *'the principal threats to humankind'*.⁴²² However, an important nuance in the French position makes it partly differ from the principal UK position. Despite the fact that the sense of urgency of the issue was recognized and perhaps stressed more than by any other by hegemonic proponents of the debate, France laid down an institutional safeguard. Although it considered that the Security Council *'cannot ignore within its mandate the threats to international security caused by global warming'*, it expressed disagreement with the choice of the Council as *'the number one forum'* where this issue should be addressed.⁴²³ Other EU Member States, such as Slovakia, Italy and the EU 'nordic driver', Denmark, adhered to the German statement. Italy added a dimension to the debate when it recommended the creation of a United Nations Environmental Organization (UNEnvO) to deal with the issue at stake.⁴²⁴ This mention – which fell somewhat outside the main lines of the Security Council debate – may be explained by the fact that the movement in favour of creating such an organization emerged in Italy. Finally, despite not being an EU Member State, Ukraine also adhered to the German statement. Its reference to the 1986 Chernobyl catastrophe recalled its proposal of a resolution on international environmental

⁴¹⁷ *Ibid.*, at 5.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ See Chapter 3, Section 2.1.2.

⁴²¹ S/PV.5663, at 11.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*, at 4.

security which it had promoted before the First and Second Committees of the General Assembly.⁴²⁵

Along with this set of developed EU countries, active proponents of approaching climate change from a security perspective – sometimes qualified as a threat, a threat multiplier or a factor in the causes of conflict – and defending the role to be played by the Security Council, it was the group of most vulnerable States that actually justified such an endeavour. This group encompasses small island States as well as some African countries sharing the fear of the consequences of climate change for their survival – either as States or as communities. They may therefore be referred to as ‘existential survivalists’ – as opposed to the ‘hegemonic survivalists’ previously mentioned. While these voices strongly legitimized and upheld the move by hegemonic States to securitize climate change, they found in their hegemonic counterpart a powerful actor with an important diplomatic leverage capable of fostering international responses to climate change impacts.

The voice of existential survivalists was best exemplified by Tuvalu, which saw the debate as a golden opportunity to qualify climate change by what it was, namely, an ‘*unprecedented threat*’ potentially infringing their ‘*fundamental rights to nationality and statehood as constituted under the United Nations Declaration on Human Rights and other international conventions*’.⁴²⁶ In contrast with the distant and blurry notions used by hegemonic survivalists to refer to climate change from a security perspective – from ‘threat multiplier’ and ‘driver of instability’ to ‘factor of the root causes of conflict’ – Tuvalu’s direct and forceful language qualified climate change not only as a full-fledged threat, but also one that largely supersedes any other threat that Small Island Developing States may ever encounter. The Tuvaluan delegate did not doubt in making a reference to the controversial statement of the president of Uganda to the African Union, in which climate change was qualified as a ‘*low-level act of aggression*’.⁴²⁷ Nor did Tuvalu restrain itself from developing such an idea further and from stating that climate change is tantamount to a ‘*chemical war of immense proportions*’.⁴²⁸ The daily fight of Tuvaluans for survival against the unchained forces of climate change could but be depicted by the allegory of war: ‘*our conflict is not being fought with guns and missiles, but with weapons from everyday life: chimney stacks and exhaust*

⁴²⁵ Security Council, S/PV. 5663 (Resumption 1), 17 April 2007 (3 p.m.), at 3. See detailed explanation of the Ukrainian proposal in Chapter 1, Section 3.

⁴²⁶ *Ibid.*, at 8.

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

pipes'.⁴²⁹ As a result of this existential plea, Tuvalu appealed to the Security Council to '*review the concept of environmental security within its mandate*'.⁴³⁰ The vigorous contention of Tuvalu found support in other Pacific Island States. Most prominently, Papua New Guinea – speaking on behalf of Pacific Island States – specified the scope of such a threat when contending that climate change '*lies at the heart of the existence of 12 independent Pacific Island States and 7 Pacific territories*'.⁴³¹ This was also the first time that the need for a more comprehensive international regime on climate change, taking into account the *sovereignty* implications for these countries, was thus openly formulated in a universal international forum. As issues pertaining to the protection of States' sovereign integrity lie at the heart of the UN Charter and of the Security Council mandate, Papua New Guinea argued that climate change should qualify for raising the sensitivity of the Council. Other delegates insisted on one specific aspect of the existential challenge, for example, the possibility that climate change exposed Pacific islanders to the risk of forceful displacement. The Solomon Islands therefore warned that, far from constituting a simple national or regional issue, the issue of climate-induced displacement would '*spill over into the international scene, where environmental victims will not be refugees, but survivors*'.⁴³² Likewise, the Marshall Islands stressed that population relocation due to sea-level rise was already a present reality in the region and, recalling that the vanishing of entire nations '*is simply without historical precedent*', stressed the consequences that the extinction of statehood would have for the definition of Marshallese cultural identity.⁴³³ The Federated States of Micronesia also alluded to the '*cultural and geographic mortality*' of Pacific Island States, qualifying climate change as a security threat '*and a threat to every aspect of life of Pacific islands*'.⁴³⁴ Moreover, closely associated with the plea of Pacific Island States – although not directly referring to climate change as a 'security threat' – the Maldives set out the basis for an important argument against the strict and exclusive characterization of climate change as a developmental issue. Indeed, building upon the speech on sea-level rise that former president of the Maldives, Abdul Gayoom, delivered before the UN General Assembly in 1987, the Indian Ocean small island State made it clear that the existential threat posed by climate change necessarily tailors and constrains any sustainability purposes. Referring to Maldives' own recent experience, the

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ S/PV.5663, at 27.

⁴³² S/PV.5663 (Resumption 1), at 12.

⁴³³ *Ibid.*, at 17.

⁴³⁴ *Ibid.*, at 25.

Maldivian delegate held that *'it is ironic that the tsunami of 2004 washed away twenty years of development work in only six days, and right after the General Assembly had adopted Resolution 59/210 on the graduation of Maldives from the list of least developed countries'*.⁴³⁵

Finally, it is worth noting that not all of the existential survivalist pleas were expressed by small island developing States: some developed countries of the Pacific region also joined their voices to this group's. First, as a developed country highly exposed to natural disasters, Japan's statement sounded closer to the existential survivalist position than to the position of the hegemonic proponents of the debate (nor, *a fortiori*, opponents to it). Japan thus particularly emphasized the need to develop disaster risk-reduction measures.⁴³⁶ Secondly, the position taken by two important developed Commonwealth countries of the region, namely, Australia and New Zealand, showed that both these countries are close witnesses of the reality of Pacific Island States and important actors in the current and future resolution of the adverse effects of climate change – not only with regard to regional trade partnerships or investment in developmental programmes, but also to possible solutions for displaced people as a result of climate change. Although the Australian delegate acknowledged that climate change *'is a different sort of threat'* to that usually debated in the Security Council, he nonetheless considered that *'a failure to act now would exacerbate the risks in the future,'* and thus called for an intensified commitment both in mitigation and adaptation actions.⁴³⁷ Along the same line, New Zealand mentioned its support to Kiribati's adaptation programme and emphasized the human dimension of the security approach to climate change and considered the debate as entirely appropriate for the forum selected.⁴³⁸

Although the existential discourse was mainly articulated and defended by Pacific Island States (along with Maldives and three developed countries of the region), some African countries adhered to it and contributed to the construction of a more complex image of the security approach to climate change before the Security Council; one that bound security issues raised by climate change to the prominent objective of African countries to reduce poverty. Therefore, while Pacific Island States focused on how climate change impacts embody an ongoing existential threat in State-centric terms (disappearance of statehood, with the consequent effects on the identity of their people as a nation), the statements of African

⁴³⁵ S/PV. 5663, at 23.

⁴³⁶ S/PV. 5663, at 29.

⁴³⁷ S/PV.5663 (Resumption 1), at 6.

⁴³⁸ *Ibid.*, at 7: *'[C]limate change is also a threat to the needs of our citizens. When those needs are threatened, whole societies are at risk of instability. So it is entirely appropriate that we are discussing the security dimension of climate change in this forum.'*

countries characterized climate change impacts as a threat to African people or societies. The statement made by Ghana's delegate illustrates particularly well the characterization of the issue as double-edged. While recalling how the advance of desertification in Saharan and sub-Saharan countries led the former Organization of African Unity to approve containment measures, Ghana highlighted how, for African countries, *'the fundamental question is how to alleviate the grave threats posed by climate change without compromising the target of 8% growth necessary for reducing poverty to tolerable levels in the next decade'*.⁴³⁹ Thus, despite the fact that the risk of encroachment of competences was acknowledged by most African countries, the seriousness of the problem seemed to weigh in favour of holding the debate within the Security Council and beginning a multilateral reflection on the security impacts of climate change. For instance, the Democratic Republic of Congo accepted the Security Council as the appropriate forum and expected this organ to become aware of this 'threat' when designing conflict-prevention strategies, given that climate change is very often associated with deep and wide-ranging effects.⁴⁴⁰ The Congolese delegate also recalled the interest of, and concern shown by, African countries in climate change, which became the topic of the 8th African Union Summit celebrated in Addis Ababa on 22–30 January 2007.⁴⁴¹ Likewise, once again mirroring the declarations of the Ugandan president on that occasion – characterizing climate change as a 'low level act of aggression' – the Namibian delegate to the Security Council held that *'humanity and the developing countries in particular have been subjected to what would be described as **low intensity biological or chemical warfare**. Greenhouse gases are slowly destroying plants, animals and human beings.'*⁴⁴² The call for establishing a regime of compensation was therefore, once again, raised: *'The cause of climate change is known. Those who are responsible for the problem are also known. Now it is the time to hold them accountable for their actions. They cannot be allowed to escape with **impunity**'*.⁴⁴³

All in all, the statements made in the Security Council debate by proponents of the link share some characteristics. First of all, they did not put much emphasis on the scientific data, despite the fact that they could count with the scientific backup of the early reports mentioned in Chapter 3. Rather, proponents of the debate based their statements on the specific manifestations of the adverse impacts of climate change as experienced in each of their countries. Secondly, the depiction of these specific images served as the benchmark from

⁴³⁹ S/PV.5663, at 7.

⁴⁴⁰ *Ibid.*, at 8.

⁴⁴¹ For a more detailed explanation of the outcome of this Summit, see Chapter 2, Section 3.2.2.

⁴⁴² S/PV. 5663, at 31, [Emphasis added].

⁴⁴³ *Ibid.*, at 32. [Emphasis added].

which proponents argued that a preventive approach to adverse climate change impacts, differing from traditional mainstream mitigation efforts, was necessary.⁴⁴⁴

2.2.2. *Opponents of the Debate: Emerging States and Their 'Developmentalist' Allies*

Opposing the existentialist voices, discussed in the preceding section, an important coalition of countries, all members of the G77+China group, opposed holding the debate before the Security Council. These opponents were, nevertheless, a heterogeneous group with a mosaic of different underlying interests. The general arguments of this group can be found in the letter in which Pakistan, as representative of the G77+China group, laid down the preliminary objections to the UK concept paper.⁴⁴⁵ A similar and straightforward explanation was provided by Egypt: the main reason why this group rejected the debate was that it '*views this open Security Council debate as an attempt by developed countries to shrug off their responsibilities in that regard*'.⁴⁴⁶ Therefore, Egypt called for re-conducting the debate on climate change within its original context, namely, under the concept of sustainable development. Other members of the G77+China group, such as Bangladesh and the Philippines, explicitly upheld this view in their individual capacities.⁴⁴⁷

Apart from the generally opposing voices raised by some members of the G77+China group, some specific interests were perfectly discernible. These emerged from countries that were Member States of the Organization of Petroleum Exporting Countries (OPEC), plus the five emerging countries nowadays known as BRICS (Brazil, Russia, India, China and South Africa), and finally members of ALBA (the Bolivarian Alliance led by Venezuela). The opposition from the BRICS coalition was first raised by China which, as a permanent member of the

⁴⁴⁴ Thereby, efforts were not yet being wasted in trying to prove the existence of a chain of cause and effect between present environmental stress situations and climate change.

⁴⁴⁵ UNSC, Letter dated 16 April 2007 from the Permanent Representative of Pakistan to the United Nations addressed to the President of the Security Council, document reference: S/2007/211, holding at paragraph 3: '*The ever increasing encroachment by the Security Council on the roles and responsibilities of other principal organs of the United Nations represents a distortion of the principles and purposes of the Charter, infringes on their authority and compromises the rights of the general membership of the United Nations*'. Four days earlier, a letter from Cuba to the Security Council, on behalf of the Non-Aligned Movement had set up the same lines, see UNSC, Letter dated 12 April 2007 from the Chargé d'affaires of the Permanent Mission of Cuba to the United Nations addressed to the President of the Security Council, document reference: S/2007/203, holding at paragraph 2: '*We would like to reiterate the concerns of the Movement regarding the continued and increasing encroachment by the Security Council on the functions and powers of the General Assembly*'.

⁴⁴⁶ S/PV. 5663, (Resumption 1), at 4.

⁴⁴⁷ *Ibid.*, at 9. Considering that Bangladesh is one of the countries most affected by the rough effects of climate change, it is not surprising that, while aligning with the statements of the G77+China group and of the Non-Aligned Movement, it still recognized that '*the security ramifications*' of climate change could '*no longer be dismissed*'.

Security Council, declared that *'climate change may have certain security implications, but generally speaking it is in essence an issue of sustainable development'*.⁴⁴⁸ Considering that the Security Council lacked expertise and was *'not the right place to take decisions with extensive participation leading to widely acceptable proposals'*,⁴⁴⁹ China stressed that this discussion should be regarded as an exception not giving rise to follow-up actions. Despite being a member of the African Union, South Africa chose to align with the position of the other BRICS countries and considered that the issue does not fall within the mandate of the Security Council; it also stressed that the debate *'should not result in any outcome or summary'*.⁴⁵⁰ Similarly, Brazil considered that there is a *'stronger link between climate change and development as opposed to security'*, and stressed that debate on the multiple dimensions of climate change (including security ones) should take place in the General Assembly.⁴⁵¹ The Russian position was even less indulgent. After appealing *'to avoid panicking and overdramatizing the situation'*, Russia listed as the appropriate forums and formats to deal with all aspects of climate change – including the analysis of new challenges and threats in this area – the UNFCCC Conference of the Parties, the General Assembly, the UN Commission on Sustainable Development, and the World Meteorological Organization.⁴⁵² Finally, India reacted quite fiercely, considering it *'obvious'* that climate change was not a threat in the context of Article 39 of the UN Charter, and even mildly threatening the international community with the possibility the pursuit of this route could have on the success of the climate change negotiations.⁴⁵³

Besides, the opposition from the ALBA countries (a recently formed group of countries which is in contradiction to the original UNFCCC political coalition of Latin America and the Caribbean, known as GRULAC), put forward by Venezuela, stressed that security as well as energy policies fall strictly within the sovereign and legitimate national definition of priorities. Venezuela's vivid reaction against any external interference in the realm of energy – which may also be understood in terms of Venezuela's status as a founder member of OPEC – was followed by its ALBA partners Cuba and Bolivia. While the former stressed the lack of

⁴⁴⁸ S/PV.5663, at 12.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ S/PV.5663, at 16.

⁴⁵¹ S/PV. 5663 (Resumption 1), at 21.

⁴⁵² S/PV.5663, at 17. Hence, although the Russia Federation is part of the OSCE region in which the Climate Change and International Security Discourse was consolidated from 2008 onwards, under the ENVSEC Initiative, the position of this country before such a global international forum as the Security Council seemingly followed that of the other BRICS countries.

⁴⁵³ *Ibid.*, at 21: *'The international community needs to be vigilant about moves that would, so to speak, make global warming cool again'*.

transparency of the Council,⁴⁵⁴ the latter appealed to '*the strictest interpretation of what constitutes a threat to the international peace and security, in accordance with Article 39 of the UN Charter*'.⁴⁵⁵ Furthermore, speaking on behalf of OPEC countries, Qatar conceptualized climate change as a part of the development issue, and considered that there was a need for an integrated approach to development that could include the fight against climate change and make both compatible: '*threats brought about by climate change do not loom over vulnerable States exclusively but are **primarily** threats to sustainable development*'.⁴⁵⁶ Qatar also considered that the power imbalances present in the Security Council did not make it the optimal mechanism to deal with the threats posed by climate change, a position backed by Indonesia.⁴⁵⁷

Last but not least, it is worth noting that a set of countries did not clearly opt either for joining the proponents or the opponents of the Security Council debate. This 'in-between' or ambiguously diluted category included Singapore, Panama, and Peru, as well as small island developing States not from the Pacific region, such as Barbados (partly Caribbean shoreline), the Comoros Islands and Mauritius (Indian Ocean shoreline), whose delegates expressed discomfort about the venue chosen for the debate, for reasons of procedural fairness, but generally upheld – or at least did not reject – the need for and suitability of approaching climate change from a security perspective. Most importantly, this 'in-between' category also encompasses the rather distant position of the United States of America, which strikingly contrasted with the U.S. national concern about the security implications of climate change that had led the Pentagon to contract specialized research on this matter since 2003 (including the CNA report released the day before the debate and explicitly mentioned by the UK delegate).⁴⁵⁸ The USA's reluctance to bring this issue before the Security Council – expressed at a time when the consolidation of the Climate Change and International Security Discourse in the OSCE and NATO regions had not yet taken place – may be understood as a preventive reaction against foreign interference in the national realms of energy and security possibly generated by development of international co-operation in these areas.⁴⁵⁹

⁴⁵⁴ S/PV.5663 (Resumption 1), at 26.

⁴⁵⁵ S/PV. 5663, at 10.

⁴⁵⁶ *Ibid.*, at 9. [Emphasis added].

⁴⁵⁷ *Ibid.*, at 14.

⁴⁵⁸ See Chapter 3, Section 2.2.1.

⁴⁵⁹ S/PV.5663, at 10-11. Indeed, the focus of the U.S. statement was mostly on the energy sector, as the delegate made reference to the United States Energy Policy Act and stressed that climate change and energy issues are being actively addressed through the UNFCCC '*and other venues with appropriate mandates*', and thus considered that the '*most effective way to bolster security stability is to increase*

Three main remarks may be made on this initial phase of operation of the Climate Change and International Security Discourse before a global international forum. First of all, consistent with the reconstruction of the origins and circulation of the Discourse described in Chapter 2, the global level of analysis reveals that the introduction of the security perspective into climate change considerations before the United Nations stemmed from an EU initiative. The timing chosen to launch this move, as well as the vague understanding that the EU and the Member States adhering to its position on the security implications of climate change, suggests that time-specific political interests – possibly seeking to increase the sense of urgency and power of leverage on the road to the Bali Summit – animated the initiative of the EU to launch a debate on ‘Energy, Security and Climate’ at the Security Council in April 2007. Yet, notwithstanding the fact that the origin of such a move stemmed from a hegemonic-driven purpose, it was soon reinforced by the expressive and homogeneous and existential pleas of Pacific Island States, which clearly affirmed that climate change impacts put at stake the very survival of their statehood. Moreover, in spite of the official position of the African group against the debate, several African States adhered to the basic contentions of Pacific Island States and proposed a belligerent image of climate change in order to claim economic compensation from developed countries. Henceforth, the dynamics discernible at a global level of analysis mirror the previous analysis of the origins, construction and circulation of the Climate Change and International Security Discourse at the regional level. This debate can be characterized as an attempt to ‘securitize’ climate change and energy. According to O. Waever’s securitization theory, an issue is ‘securitized’ when it is introduced to a relevant audience – in this case, the Security Council – through a discursive process (or ‘speech acts’ in Austin’s theory of linguistics), in order to be taken out of the realm of normal politics.⁴⁶⁰ As the process is only completed when the relevant audience accepts it, reactions against the debate may be understood as attempts to prevent the securitization of climate change from being fully perfected. Hence, while most opponents of the debate did not directly deny the existence of security consequences stemming from climate change impacts, they firmly reacted against the possible political consequences of re-conceptualizing climate change as a security issue in terms of decreased leverage in the mainstream forums and climate change negotiations.

the capacity of States to govern effectively’, and that successful development strategies are an important part of such a purpose.

⁴⁶⁰ O. WAEVER, ‘Securitization and Desecuritization’, *supra*.

However, most proponents and opponents of the debate have one point in common: when speaking of the security implications of climate change, no scientific report justifying the approach is referred to. They have all based their position on the reaction to or support of the testimonials of Pacific Island States (when the reports on climate change and international security had not yet been developed). All in all, the strength of the opposing voices impeded the adoption of a presidential statement after the debate; climate change thus fell short of being fully securitized in 2007. Yet, as proponents of the debate sought to legitimize the Climate Change and International Security Discourse and extend the recognition of its content to all UN Member States, the acceptance of the Discourse by relevant global organizations was pursued. The second stage of this process would take place at the UN General Assembly where, confronted with a fully multilateral arena, the original presentation of the Discourse by the EU would be restated.

3. THE UN GENERAL ASSEMBLY RESOLUTION ON 'CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS' (2009): A LEGITIMIZING AND EXPANSIVE MOVE

3.1. The Road to Resolution 63/281 (2009): Resignifying the Climate Change and International Security Discourse

3.1.1. The 2008 Proposal of Pacific Island States: A Shift in the Commanding Hands

Considering the high level of opposition to the introduction of climate change into the Security Council agenda, the next move envisaged by the proponents directed the Climate Change and International Security Discourse towards the General Assembly. Shifting forums is commonly used as a diplomatic strategy for controversial topics with limited support within one body (here, the Security Council) in order to achieve a higher degree of legitimacy in another (here, the General Assembly) and thus, indirectly, put pressure on the Council to resolve the matter. It mainly implied that, for the first time, the Climate Change and International Security Discourse was to be put before a truly global forum. The extension of the Discourse to a global audience, such as the UN General Assembly, would yet have consequences for the content and understanding of the Discourse. Instead of trying to 'green' the Security Council, the move suggested securitizing the way in which the Assembly had dealt with climate change until then and seemingly suggested that the division of competences between the two major UN organs with regard to global environmental protection may deserve being questioned, if not revised.

The long history of involvement of the General Assembly with climate change dates back at least to the adoption in 1989 of Resolution 44/206 on the possible adverse impacts of sea-level rise on islands and coastal areas, particularly low-lying coastal areas, promoted by the former president of Maldives, Abdul Gayoom.⁴⁶¹ From this benchmark, the Assembly endorsed the creation of the IPCC (by WMO and UNEP) and became the patron of the climate change negotiations that led to the adoption of the UNFCCC in 1992. By the time the debate was taking place in the Council, the Assembly had taken note of the outcome of the IPCC 4th Assessment Report and of diplomatic efforts to organize the 2007 Bali Climate Change Summit, six months later. Following the success of the Bali Climate Change Summit, the Assembly held a thematic debate during the early months of 2008 entitled 'Addressing Climate Change: the United Nations and the World at Work', without, however, reflecting any of the contentions or perspectives on climate change introduced during the Security Council debate.

The change occurred on 27 October 2008 when fifty-two States submitted a Draft Resolution to the Assembly entitled 'Security and Climate Change'. However, neither the USA, the BRICS group, the OPEC countries, members of ALBA, nor countries parties to the UNFCCC African Group were active proponents of this draft.⁴⁶² The proposal was introduced by members of AOSIS – led particularly by Pacific Island States – as well as by EU Member States, and was supported by some former Soviet Republics (OSCE members which are today mostly under the regional influence of the EU). Australia and New Zealand also backed the Draft Resolution, in consideration of their close economic and geographical connection with the Pacific Island States. The original survivalist group which originated and crystallized before the Security Council some months earlier was thus seemingly maintained on the path towards a general recognition of the General Assembly. The Euro–Pacific coalition structuring the core of this process became all the more visible after the Joint Declaration on the EU–Pacific Islands Partnership, of 7 November 2008. Although the Joint Declaration was delivered in a different

⁴⁶¹ UNGA Res. 44/206, 'Possible Adverse Effects of Sea-Level Rise on Islands and Coastal Areas, Particularly Low-lying Coastal Areas', document reference: A/44/206, adopted on 22 December 1989, 85th plenary meeting.

⁴⁶² General Assembly, Draft Resolution on 'Security and Climate Change', 27 October 2008, document reference: A/63/L.8, filed under Agenda item 107 (Follow-up to the outcome of the Millennium Summit). Proponents of the Draft Resolution were: Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Chile, Cyprus, Czech Republic, Denmark, Estonia, Fiji, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kiribati, Latvia, Lithuania, Luxemburg, Maldives, Malta, Marshall Islands, Federated States of Micronesia, Monaco, Nauru, The Netherlands, New Zealand, Palau, Papua New Guinea, Philippines, Poland, Portugal, Romania, Samoa, Seychelles, Slovakia, Slovenia, Solomon Islands, Spain, Sweden, Tonga, Turkey Tuvalu, United Kingdom and Vanuatu.

forum, it undoubtedly marked the bond between the two regions.⁴⁶³ All seems to indicate that the EU–Pacific SIDS team went ahead with their diplomatic mobilization in the corridors of the General Assembly.

The first amendments to the Draft Resolution were filed on 17 November 2008 by OPEC countries and some of their allies, such as Egypt.⁴⁶⁴ The most significant amendment of the text proposed by this group of countries was a decrease in the level of recognition of a chain of causation between climate change and security issues – whether observed or anticipated. Hence, the original title of the Draft Resolution ‘Security and Climate Change’ was replaced by ‘Climate Change and its Possible Security Implications’.⁴⁶⁵ This aim was reinforced by the deletion of the four preambular paragraphs describing the role of the Security Council in this matter; they were replaced by the incorporation of four paragraphs at the end of the text which essentially sought to ensure that the recognition of the security implications of climate change would not bring about any structural change in the international co-operation and regime on climate change. Henceforth, the additional paragraphs introduced into the text pursued three main purposes: (1) locating the future resolution within the framework of the UNFCCC negotiation track; (2) recalling the longstanding history of involvement of the Assembly with international co-operation on climate change between 1988 and 2007 and putting the weight back into this organ; and (3) making reference to the link between climate change and development by recalling the outcome of the 2005 World Summit.⁴⁶⁶ Arguably, these amendments operated de facto as a de-securitization move of the issue which sought to restore development as the primary rationale and theoretical framework into which international co-operation on climate change was inserted.⁴⁶⁷ Nonetheless, in exchange, official acknowledgment of the existence of security implications stemming from climate change was achieved – although this compromise fell short of conceiving any possible security implications of climate change as a limit to developmental efforts. A balance between

⁴⁶³ To recall the stages of construction of this new alliance, see Chapter 2, Section 3.2.2.

⁴⁶⁴ UN General Assembly, Amendments to Draft Resolution A/63/L.8, 17 November 2008, document reference: A/63/L.30. The amendments were filed by: Bahrain, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Libya, Malaysia, Nicaragua, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen.

⁴⁶⁵ *Ibid.*, paragraph 1.

⁴⁶⁶ *Ibid.*, paragraphs 8 and 9.

⁴⁶⁷ As previously indicated in Chapter 1, scholars of the Copenhagen School defined ‘securitization’ as the process by which an issue is presented as an existential threat to a relevant audience, which accepts such understanding of the issue. Accordingly, de-securitization takes place when securitization is reserved, for an issue is moved out from the realm of ‘security’ (previously allowing exceptional measures to be displayed) and re-enters the realm of normal politics. See B. BUZAN and O. WAEVER and J. DE WILDE, *Security: a New Framework of Analysis*, 1998, (Boulder, Colo.: Lynne Rienner Pub).

existential and developmental rationales was thus carefully preserved when the amended Draft Resolution was presented to the General Assembly on 18 May 2009.⁴⁶⁸

3.1.2. The Adoption of the Resolution by the General Assembly: Reaching a Compromise on the Dividing Lines of the Debate

On 3 June 2009, the plenary of the General Assembly, chaired by Nicaragua, debated the amended Draft Resolution. The President of Nauru, Marcus Stephen, speaking on behalf of Pacific Island States, opened the debate and thereby visibly marked how the commanding hands of this process had shifted from the EU to the Pacific. As drivers of this political move, in search of recognition by the General Assembly of the security implications of climate change, Pacific Island States counted with an enlarged support, given that, since the Draft Resolution was originally filed, thirty-four additional States had become supporters and co-sponsored the text (small island States from other regions, some African countries and, most prominently, the USA). As the delegate of Nauru argued, *'the Draft Resolution points to the adverse effects of climate change in a holistic manner'*.⁴⁶⁹ Indeed, the final text clearly stated that the Security Council had the responsibility to look at the security aspects of climate change and requested the Secretary-General to prepare a comprehensive report, perceived by the sponsors of the Draft Resolution as a *'crucial first step as we move forward on this issue'*.⁴⁷⁰ In spite of the insistence of Nauru on the positive and innovative aspects of the Draft Resolution in its compromise form, some members of the Pacific Islands Forum made declarations stressing the need to accept a higher level of involvement of the Security Council in the security implications of climate change. Thus, while Palau insisted on the role of the Security Council under Chapter VI of the UN Charter,⁴⁷¹ Tuvalu urged *'the Security Council and other relevant organs to treat*

⁴⁶⁸ UNGA Draft Res., 'Climate Change and its Possible Security Implications', document reference: A/63/L.8/Rev.1, 18 May 2009, presented under Agenda item 107 (Follow-up to the outcome of the Millennium Summit). This Draft Resolution was sponsored by: Albania, Andorra, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Fiji, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Lichtenstein, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Federated States of Micronesia, Monaco, Nauru, The Netherlands, New Zealand, Norway, Palau, Papua New Guinea, Philippines, Poland, Portugal, Republic of Moldova, Romania, Samoa, Seychelles, Slovakia, Slovenia, Solomon Islands, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom and Vanuatu.

⁴⁶⁹ UN General Assembly, Verbatim Record, document reference: A/63/PV.85, 3 June 2009 (10 a.m.) 85th plenary meeting, at 3.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*, at 11: '[U]nder Chapter VI of the United Nations Charter, the Security Council may investigate any dispute or situation that might lead to international friction or give rise to a dispute. Could we not envision the Council immediately investigating the security implications of climate change and

this issue with the urgency that a security threat of this magnitude deserves,⁴⁷² a contention supported by Switzerland, which regretted that the role of the Security Council had been downgraded by Resolution 63/281.⁴⁷³ Seemingly, the Solomon Islands stated that Resolution 63/281 will allow a proactive action of the United Nations *'before we arrive at a point when these threats become serious and irreversible'*,⁴⁷⁴ while Fiji expressed once again the existential threat that climate change constitutes for small island States, as *'the security implications of climate change have been, first and foremost, a threat to our very existence as sovereign nations. All else will be immaterial if statehood is lost.'*⁴⁷⁵ Interestingly, the USA departed from the distance and scepticism it showed during the 2007 debate in the Security Council, and applauded the Draft Resolution in its amended form.

In contrast, old opposing voices resonated again in the General Assembly. Argentina's position against any involvement of the Security Council in this issue was unsurprisingly followed by Brazil. Maintaining the position expressed in the 2007 Security Council debate, Brazil stated that attempts to shift the debate on concerted action against climate change from development to security ought to be avoided and declared that the consensus of this text should not be interpreted as recognition of a direct link between climate change and security.⁴⁷⁶ The Brazilian objection was backed up by China, although the latter adopted a smoother position which did not fully deny the possible existence of security implications of climate change and thus considered that *'climate change is an issue of sustainable development rather than a security issue'*. Yet, as a measure seeking to control the effects of the Resolution, the Chinese statement warned of – or perhaps subtly threatened – the possible consequences of this securitization move on the future of the climate change regime for the period post-2012.⁴⁷⁷ Likewise, the Arab group declared that the UNFCCC remained the appropriate forum for dealing with climate change and stressed once again that the division of competences between the General Assembly and the Security Council laid down in the UN Charter should be respected.⁴⁷⁸

recommending appropriate procedures and methods of adjustment if it determines that the situation may engender international peace and security?'

⁴⁷² *Ibid.*, at 13.

⁴⁷³ *Ibid.*, at 15.

⁴⁷⁴ *Ibid.*, at 14.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*, at 20.

⁴⁷⁷ *Ibid.*, at 21, [Emphasis added]: *'[W]e do not want to see the resolution's request for a report of the Secretary-General having a negative impact on that negotiating process.'*

⁴⁷⁸ *Ibid.*, at 6.

Despite the fact that these opposing voices could have conveyed the impression that little political advance had been achieved since the 2007 debate, in the end their effect was rather limited and did not seem to stand so strictly, as the General Assembly Resolution 63/281 on 'Climate change and its Possible Security Implications' was endorsed, by consensus, on the same day of the debate.⁴⁷⁹ As the Secretary-General of the Pacific Island Forum explained, *'the UNGA's endorsement of the resolution by Pacific SIDS at the UN goes a long way towards the implementation of the Pacific Forum Leaders' Niue Declaration at their meeting last August committing its members to advocate and support the recognition in all international fora the urgent social, economic and security threats by the impacts of climate change and sea-level rise on its members.'*⁴⁸⁰ The endorsement by the General Assembly of Resolution 63/281 represented above all an unprecedented success story of the Pacific Island States which, as the Australian delegate explained *'are not countries that usually make a lot of noise in this hall'*. When, for once, these countries *'came to us asking for something fundamentally important'*, they achieved their purpose through important diplomatic mobilization – especially in alliance with EU countries – and some degree of compromise on the resulting outcome. The final text of General Assembly Resolution 63/281 stressed that *'the UNFCCC is the key instrument'* of international co-operation to fight climate change, and softened the level of acknowledgement of the causal chain between climate change and security by stating that *'the severe impacts of climate change, including sea-level rise, **could have possible security implications.***⁴⁸¹ In spite of this dilution, the text included an invitation to intensify efforts and called on the Secretary-General to prepare a Report on Climate Change and International Security on the basis of the contribution of States and present it to the General Assembly as soon as possible⁴⁸² – an urgency that was likely connected with the fact that the Copenhagen Climate Change Summit, to be held a few months later (December 2009) was rapidly approaching.

The first effect of the adoption of this Resolution by the General Assembly affected the Climate Change and International Security Discourse itself. On the one hand, as the entity dealing with this issue shifted from the Security Council to the General Assembly and the original division of competences between these two organs was restored, the adoption of the Resolution was legitimized and implied that, for the first time, the link between climate change

⁴⁷⁹ UNGA Res. 63/281, 'Climate Change and its Possible Security Implications', adopted on 3 June 2009, 85th plenary Meeting.

⁴⁸⁰ Pacific Islands Forum, Secretary-General's press interview, UN Press Release, 3 June 2009.

⁴⁸¹ *Ibid.*, paragraph 5.[Emphasis added].

⁴⁸² *Ibid.*, paragraph 2 of the operative part.

and security was recognized by the international community as a whole.⁴⁸³ Yet, throughout the process that finally led to the adoption of the Resolution, the shared understanding of what that link constituted – particularly when compared with the original presentation of the security implications of climate change to the Security Council in 2007 – evolved. This process, which may be referred to as the resignification of the Climate Change and International Security Discourse, was arguably influenced (or even directly caused) by the fact that Pacific Island States took over the role previously played by the EU and became drivers of the political movement at the General Assembly. As a result, the final recognition of the possible security implications of climate change excluded any reference to or connection with energy issues and, as the statements delivered before the General Assembly show, the new common understanding was that the security implications of climate change primarily refer to the existential threat that climate change impacts represent for the continuation of small islands' statehood. This idea is consistent with the fact that, despite all the amendments to the original Draft Resolution and the elimination of many references to concrete manifestations of the security implications of climate change, the last preambular paragraph, preceding the operative part of the Resolution, maintained one specific reference when stating '*[d]eeply concerned that the adverse impacts of climate change, **including sea-level rise**, could have possible security implications*'.⁴⁸⁴

Some effects of the Resolution, other than the points of discussion, should also be noted. In spite of the wide margin of operation within which the General Assembly may display its competences, the UN Charter falls short of investing this political organ with formal legislative competences within the UN system. Henceforth, it is generally admitted that the effects of General Assembly resolutions are in principle of a political – rather than legal – nature; void of any autonomous normative power, they are tantamount to mere recommendations and do not constitute, per se, a source of international law.⁴⁸⁵ Yet, given the fact that the constituency of the General Assembly is the Member States, the resolutions adopted by it (especially when adopted by consensus) can be understood as the expression of the political will of the international community as a whole. Sometimes the General Assembly thus stands on the fence and, while its resolutions operate as a mirror of the evolution of international life, they may also correlatively generate, crystallize or determine the evolution of international law – particularly of customary rules.

⁴⁸³ S./PV.5663, *supra*, at 24.

⁴⁸⁴ UNGA Res. 63/281, *supra*, paragraph 9. [Emphasis added].

⁴⁸⁵ A. REMIRO BROTONS *et al.*, *Derecho internacional*, 2007, (Valencia: Tirant Lo Blanch), at 548.

Notwithstanding the fact that Resolution 63/281 was adopted by consensus, considering that its adoption may have planted the seeds of a new legal principle or potentially the basis of a customary rule seems too far-fetched. And yet, the adoption of Resolution 63/281 is not irrelevant from a legal perspective. Rather than generating a new rule, the fundamental legal implication of the Resolution is that it invites an unprecedented legal question touching upon the core institution of international law – the State: may the very continuation of statehood of small island States be jeopardized by climate change impacts? Moreover, while this question awaits an answer from the relevant global organizations, the effects of this Resolution can, for the time being, be considered in the realm of politics. As the operative part of the Resolution invited the relevant organs of the United Nations to *‘intensify their efforts in considering and addressing climate change, including its possible security implications’*, evolution in various areas of international co-operation may be expected (such as climate change adaptation, development of disaster risk-reduction policies, etc.). We may therefore take a closer look at whether the evolution of the Climate Change and International Security Discourse before the two core organs of the United Nations had an impact on the international regime on climate change and on the policy action of other UN agencies and institutions falling under the umbrella of the General Assembly.

3.2. From UN Organs to UN Agencies and Institutions: Spreading the Climate Change and International Security Discourse

3.2.1. The Impact of the Copenhagen Climate Change Summit on the Climate Change and International Security Discourse

Although General Assembly Resolution 63/281 recognized the existence of the ‘security implications of climate change’, it fell short of specifying what situations were to be considered as such. The task was given to the Secretary-General who was requested to elaborate as soon as possible a report *‘based on the views of the Member States and relevant regional and international organizations’*.⁴⁸⁶ The Secretary-General submitted his Report on ‘Climate Change and its Possible Security Implications’ to the General Assembly on 11 September 2009, three months after the endorsement of Resolution 63/281.⁴⁸⁷ During the preparation phase of the Copenhagen Summit, to be held in December 2009, tension over climate change negotiations grew steadily. Informal pre-Summit talks between June and

⁴⁸⁶ UNGA Res. 63/281, *supra*, second operative paragraph.

⁴⁸⁷ UN General Assembly, ‘Climate Change and its Possible Security Implications: Report of the Secretary-General’, document reference: A/64/150, 11 September 2009.

September 2009 included the heated gatherings of Bonn (August 2009) and Barcelona (September 2009). At the time when the unprecedented level of global political attention on the Summit had reached its peak, the Climate Change and International Security Discourse was already solidly consolidated in 'hegemonic regions' (from its institutionalization in the EU to its extension to the OSCE and NATO regions), and its dissemination to 'the most vulnerable regions' (in particular Pacific Island States and African Union Member States) had already begun.⁴⁸⁸ The EU contribution to the report of the Secretary-General thus reproduced the core findings of the Report on Climate Change and International Security elaborated in March 2008 by the EU High Representative and the European Commission.⁴⁸⁹ After stating that the EU 'stands ready to support the UN' in the endeavour to deal with the security implications of climate change, the EU Report proposed that future action within the UN system should include: (i) debate on climate change and international security in international fora; (ii) enhancement of policy coherence by mainstreaming climate protection into several connected sectors (including development, trade and security policies), so as to keep the issue of climate change '*high on the world's agenda (...) beyond Copenhagen*'; (iii) integrating climate change issues into existing security mechanisms (such as early warning systems, prevention, management and resolution of conflicts); (iv) sharing analyses of the causal links between climate change and security, the impact of climate change on existing tensions, as well as of possible regional security consequences of climate change, among several relevant UN agencies (e.g. UNEP and the CEB, and the UNFCCC); (v) strengthening relevant observation networks; (vi) managing disasters by improving the capacity of UN agencies, such as the OCHA and the UNHCR, to anticipate increases in disasters and migration flows related to climate change; (vii) defining common guidelines on prevention and management in collaboration with the UN International Strategy for Disaster Reduction (UNISDR) and the World Meteorological Organization and building on the Hyogo Framework for Action; (viii) development of the systematic use of multinational adaptation activities to create a peace-building function; (ix) mainstreaming climate change within the realm of UN activities (DPKO, DPA, UN Funds, Programmes and Specialized Agencies); (x) co-ordination of UN activities in this field with those of regional organizations, such as the EU or the AU; and (xi) emphasizing the capacity to reduce security threats stemming from climate change '*in current negotiation processes within*

⁴⁸⁸ See Chapter 2 above.

⁴⁸⁹ The Paper from the High Representative and the European Commission to the European Council on Climate Change and International Security was actually attached to the EU contribution to the report of the Secretary-General.

UNFCCC on how to design adaptation strategies in the most vulnerable regions and countries'.⁴⁹⁰

While the Report of the Secretary-General seemingly had to take into account other views, the contribution of the EU undoubtedly had an important impact on it. Indeed, while the Report acknowledged that the *'nature and full degree of security implications of climate change are still largely untested'*, and emphasized that sustainable development constituted a *'crucial contributor to conflict prevention'*,⁴⁹¹ it nonetheless qualified climate change as a *'threat multiplier'*, and listed five specific *'channels'* through which climate change could affect security, including – but not limited to – the possibility of reversing development processes.⁴⁹² Security implications of climate change were thus consolidated in the report of the Secretary-General as practical limits to the effectiveness of development policies. Yet, more interestingly, the report also included the novel concept of *'threat minimizers'*. Defined as the *'conditions or actions that are desirable in their own right but also help lower the risk of climate-related insecurity'*, it included, inter alia, climate change mitigation and adaptation. Arguably, mainstream climate change negotiations could thus be influenced by this official integration of the Climate Change and International Security Discourse into the agenda of the United Nations. Yet, no direct or visible traces of the Discourse were discernible during the Copenhagen Summit. To begin with, the claims made by AOSIS – but not specifically by Pacific Island States – in Copenhagen did not include any allusion to the security implications of the climate change, not even with respect to the need to develop further climate change adaptation measures. As already pointed out in Chapter 2, the only reference to the Climate Change and International Security Discourse in Copenhagen was its celebration as a side-event chaired by the Secretary-General of NATO.⁴⁹³ In fact, despite the fact that the Danish Prime Minister had been an active promoter of the Discourse in the NATO region, a seemingly precautionary approach to the Climate Change and International Security Discourse was adopted when organizing the Summit, given that the Discourse was – at least at its outset – felt to be a strategy only seeking to increase political pressure or even force a climate

⁴⁹⁰ *Ibid.*, at 6.

⁴⁹¹ UNGA A/64/150, Report of the Secretary-General, *supra*, paragraph 3, at 4.

⁴⁹² The other four channels were: vulnerability (understood as threat to food security and human health, and increased human exposure to extreme events); coping and security (encompassing migration and competition over natural resources); statelessness (focusing on the implications for sovereignty of the loss of statehood because of disappearance of territory); and international conflict (understood as the implications for international co-operation of climate change impacts on shared or non-demarcated international resources).

⁴⁹³ See Chapter 2, Section 2.2.2.

agreement for the post-2012 period. There was therefore the fear that this controversial dimension of the Discourse might jeopardize the success of the negotiations. Yet, despite the low-profile – and almost total neglect – of the Discourse in Copenhagen, the result of the Summit did not reach the level of expectations, for reasons of course well outside the realm of the Discourse itself.

Nonetheless, after the failure of COP.15 – or perhaps precisely because of it – research and work on climate change as a global challenge to be considered under a security perspective was not abandoned. On the one hand, it was pursued, as was indicated in the previous Chapter, both at the national and regional levels of analysis (USA, OSCE). On the other hand, the Discourse was taken on board by some UN agencies and institutions.

3.2.2. Intra-institutional Circulation of the Security Approach to Climate Change in UN Agencies and Institutions

Following adoption of Resolution 63/281 and release of the Report of the Secretary-General, the Climate Change and International Security Discourse could be expected to be circulated within UN Specialized Agencies and institutions, albeit only to the extent that their respective mandates would be appropriate and therefore enable them to receive it. Thus, one main characteristic of the inter-institutional circulation of the Climate Change and International Security Discourse in UN Specialized Agencies and institutions is its ‘sectoralization’ – understood as the development of the Discourse and its concretization in specific policies through separate clusters corresponding to the scope of action of each institution or agency. It appears that the Discourse generated more development in those agencies dealing with human rights and migration issues. These two areas, which had been particularly privileged by the institutional and policy changes of the mid-1990s, resulting from the conceptual shift of attention from State security to human security, were influenced from 2007 onwards by the introduction of the Climate Change and International Security Discourse into UN organs, as well as, at the same time, in parallel to the policy – driven by the Maldives – seeking to approach climate change from a human rights perspective. The launch of a research programme by the Human Rights Council, following adoption in 2008 of Resolution 7/23 on Human Rights and Climate Change, is thus notable in this sense.⁴⁹⁴ It also attracted the attention of the World Bank and the Asian Development Bank, which contracted research for

⁴⁹⁴ Human Rights Council, Resolution 7/23, ‘Human Rights and Climate Change’, 28 March 2008, 41st meeting.

the elaboration of a report on this issue.⁴⁹⁵ Likewise, the UN High Commissioner for Refugees, initially very reluctant to recognize 'climate refugees' as a distinct category, began tackling this issue through informal talks and seminars from 2009 onwards.⁴⁹⁶ However, the most relevant example of how the Discourse survived the mere context-specific instrumental issue and maintained its presence within universal organizations is undoubtedly the celebration in 2011 of the second Security Council debate on the maintenance of international peace and security.

4. THE SECOND SECURITY COUNCIL DEBATE ON 'MAINTAINING INTERNATIONAL PEACE AND SECURITY – CLIMATE CHANGE IMPACTS' (2011): TOWARDS A CONSOLIDATION OF THE SECURITY APPROACH TO CLIMATE CHANGE IN THE UNITED NATIONS

4.1. Back to the Security Council: The Pursuit of the German Strategy

4.1.1. Increased Awareness of Climate change Impacts in Mainstream Climate change Negotiations: from Copenhagen to the Durban Climate Change Summit (2009–2011)

As the Copenhagen Conference failed to lead to a legally binding agreement for the second commitment period post-2012, the uncertainty in both the architecture of the regime and the content of the respective obligations of UNFCCC and KP Member States – particularly of key greenhouse-gas (GHG)-emitting countries – reached its peak. And yet, at the time that expectations of one day seeing continued international co-operation on climate change crystallize were progressively deceived, the sense of the gravity of climate change impacts and the urgency to respond to them was becoming more palatable than ever. The emergence of the Climate Change and International Security Discourse, and in particular its introduction into global organizations and its resignification therein undoubtedly contributed to the construction of an understanding of the dimensions that climate change impacts could encompass.

One of the manifestations of this evolving awareness was the gradual shift of the focus, in climate change negotiations, from mitigation to increased development of adaptation.⁴⁹⁷ Hence, although the Copenhagen Accord fell short of establishing an agreement

⁴⁹⁵ S. McINERNEY-LANKFORD and L. RAJAMANI, *Human Rights and Climate Change: a Review of the International Legal Dimensions*, 2011, (Washington, D.C: World Bank).

⁴⁹⁶ See UN High Commissioner on Refugees 'Climate Change, the Environment, Natural Disasters and Human Displacement: a UNHCR Perspective', (Policy and Evaluation Service), 29 January 2008. For a detailed account of the spread of the issue of climate-related displacement in several international organizations and institutions, see J. McADAM, *Climate Change, Forced Migration and International Law*, *supra*, Chapter 8, pp. 212-217.

⁴⁹⁷ Indeed, despite the fact that Article 4 of the UNFCCC contemplates both types of action, the first two decades of international co-operation on climate change have undoubtedly been characterized by the

on future mitigation compromises, it did establish an important increase in adaptation finance.⁴⁹⁸ Such a standpoint would prove to be important at the Durban Climate Change Conference celebrated a year later, where a new Adaptation Scheme was agreed.⁴⁹⁹ Meanwhile, the already observable urgency and gravity of climate change impacts – and not merely based on mid-term or long-term projections – also found a reference in the work of the IPCC, which began the preparation of a Special Report on Climate Change and Extreme Events (to be released in 2013), whose core contentions would probably be reflected in the IPCC's 5th Assessment Report.⁵⁰⁰

4.1.2. *The 2011 German Proposal: A Historical Opportunity*

Pursuant to the rotation principle stated in Rule 18 of the Security Council Provisional Rules of Procedure, Germany assumed the Presidency of the Security Council for one month in July 2011.⁵⁰¹ In a letter to the UN Secretary-General on the first day of Germany's presidency, Ambassador Peter Witting (German representative acting in his capacity as UNSC President) called for an open debate in the Council to address the issues raised by climate change impacts within the context of agenda item 'Maintenance of International Peace and Security'. In order to facilitate the achievement of this purpose, the letter included a concept paper for the debate, which was transmitted by the Secretary-General, Ban Ki-Moon, to UN Member States.⁵⁰² Thus, on 20 July 2011, more than four years after the 2007 debate on 'Energy, Security and Climate', the Security Council was called upon to discuss the security perspective of climate change for the second time in its history. On this occasion, the composition of the Council counted with the four strong emerging powers that had fervently opposed the 2007

development of concerted mitigation policies, correlatively leaving adaptation in a second place. Nonetheless, as climate-change impacts turn out to be present realities – instead of uncertain projected scenarios – and climate-change negotiations get stuck on the issue of how the burden of mitigation responsibilities be shared between developed and emerging countries for the period post-2012, adaptation is beginning to acquire a more prominent role in the international regime of climate change.

⁴⁹⁸ See UNFCCC, Decision 2/CP.15, 'Copenhagen Accord', adopted on 18 December 2009. After failing to be endorsed by the Conference of the Parties as a COP Decision, the Conference of the Parties 'took note' of the Accord and annexed it to Decision 2/CP.15.

⁴⁹⁹ See Introduction, *supra*.

⁵⁰⁰ See IPCC, FIELD, C. B., BARRO, V., STOCKER, T. F., QIN, D., DOKKEN, D. J., EBI, K. L., MASTRANDREA, M. D., MARCH, J. J., PLATTNER, G. K., ALLEN, S. K., TIGNOR, M., MIDGLEY, P.M. (eds.), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, Special Report*, 2012, (Cambridge, UK: Cambridge University Press).

⁵⁰¹ Rule 18 of the Security Council Draft Rules of Procedure states: '*The presidency of the Security Council shall be held in turn by the members of the Security Council in the English alphabetical order of their names. Each President shall hold office for one calendar month*'.

⁵⁰² The German concept paper is contained in the Letter of the German Presidency of the Security Council to the UN Secretary-General, dated 1st July 2011, document reference: S/2011/408.

initiative (Brazil, India and South Africa, as non-permanent members, and China, as a permanent member). Three EU Member States (United Kingdom and France, as permanent members, and Germany, as a non-permanent member but nevertheless holding the presidency of the Council) were also sitting on the Council, along with the remaining two permanent members, United States of America and the Russian Federation; and six non-permanent members (Bosnia and Herzegovina, Colombia, Gabon, Nigeria, Portugal and Lebanon).

Mirroring the 2007 precedent and pursuant to Rule 37 of the Security Council Provisional Rules of Procedure, fifty UN Member States not sitting on the Security Council in July 2011 were invited to participate in the debate (without the right to vote) by the President of the Council.⁵⁰³ Likewise, in accordance with Rule 30, Achim Steiner was also invited to participate in the meeting in his capacity of Executive Director of the United Nations Environment Programme.⁵⁰⁴ All in all, sixty-five participants actively took the floor in the debate, including the Parliamentary Secretary for Pacific Islands Affairs of Australia and the President of Nauru, M. Stephen, who made an eloquent and rather testimonial statement on behalf of the Pacific Island States, the Maldives, Seychelles and Timor-Leste. Instead of opening the debate by defending the German concept paper on the issue, as the British delegate, Margaret Beckett, had done in 2007, the President of the Council invited Secretary-General Ban Ki-Moon to deliver the opening statement, followed by the briefing of the Executive Director of UNEP.

While the former focused on the political appropriateness of the debate, the latter brought out the technical and scientific knowledge of UNEP on this issue, so as to promote the idea that consideration of climate change as a factor in the future stability of the international sphere was not just an academic matter. Both speakers unambiguously supported the German initiative. The introduction of the Secretary-General to the topic of discussion began by considering climate change and international security as a '*double-barrelled challenge*' that not only exacerbated existing threats to international peace and security but was '*a threat to the*

⁵⁰³ In alphabetical order: Argentina (on behalf of G77 group), Australia, Bangladesh, Barbados, Belgium, the Plurinational State of Bolivia, Canada, Chile, Costa Rica, Cuba, Denmark, Ecuador, Egypt, El Salvador, Fiji, Finland, Ghana, Honduras, Hungary, Iceland, Ireland, Islamic Republic of Iran, Israel, Italy, Japan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Luxembourg, Mexico, Nauru, New Zealand, Palau, Papua New Guinea, Pakistan, Peru, Philippines, Poland, Republic of Korea, Singapore, Slovenia, Spain, Sudan, Turkey, United Republic of Tanzania and the Bolivarian Republic of Venezuela.

⁵⁰⁴ Mr. Achim Steiner was elected Executive Director of UNEP in 2006 and was re-elected in 2010. He is a German and Brazilian national and wrote a short paper on the concept of environmental security. See A. STEINER, 'Environmental Security' (2006) *G8 Summit: Issues and Instruments*, pp. 52-56.

international peace and security’ on its own that could lead to *‘serious security vacuums’*.⁵⁰⁵ Most importantly, his full support for the initiative was reinforced by his assessment of the existing multilateral agreements on climate change (the UNFCCC and the Kyoto Protocol) which, in his view, provided *‘an important but incomplete foundation for action’*.⁵⁰⁶ Thereby, he defended the vital role of the Security Council in clarifying the link between climate change, peace and security, as well as in mobilizing national and international action, and even qualified it as a *‘unique responsibility’* for the Council.⁵⁰⁷ His most advanced concession was to recognize that the most effective foundation for peace is securing sustainable development and that efforts were yet to be made at the next Rio+20 Conference (to be held a year later, in June 2012). This position was consistent with his former declarations always in favour of raising awareness of the link between climate change and international security in any of the UN organs.⁵⁰⁸

Following the Secretary-General’s undeniably strong plea in favour of the German initiative, A. Steiner, in his briefing to the Council on behalf of UNEP, used more cautious terms. His presence not only served to give a more solid scientific grounding to the initiative; as a programme directly linked to the General Assembly, the presence of UNEP (through its Executive Director) may have also, to some extent, represented the presence of the General Assembly within the space and sphere of influence of the Security Council. Thus, A. Steiner began approaching this controversial issue by asserting that the IPCC *‘remains the first point of reference of climate science’*.⁵⁰⁹ This contention apparently discarded analysis of this issue on the basis of the reports (including the Secretary-General’s on ‘Climate Change and its Possible Security Implications’) that, as explained in Chapter 2, had been progressively shaping a new ‘epistemic community’ on climate change and international security.⁵¹⁰ Yet, notwithstanding

⁵⁰⁵ UN Security Council, S/PV.6587, 6587th meeting, 20 July 2011, 10 a.m., at 2.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.* As Secretary-General Ban Ki-Moon himself recalled: *‘I argued then (in the 2007 debate), and do so again today, that is not only appropriate, it is essential. I welcome the fact that we have moved forward and are having the right debate today, about what the Council and all Member States can do to confront the double-barreled challenge of climate change and international security [...] We must make no mistake [...] It not only exacerbates threats to international peace and security, it is a threat to international peace and security [...] that can create dangerous security vacuums’*. Moreover, he established a bridge between human and international peace and security when stating: *‘[C]ompetition for scarce resources, especially water, is exacerbating old security dilemmas and creating new ones. ‘Environmental refugees are reshaping the human geography of the planet. [T]hose are all threats to human security as well as to international peace and security.’* [All emphasis added].

⁵⁰⁹ *Ibid.*, at 3.

⁵¹⁰ On the constitution of the epistemic community consolidating the Climate Change and International Security Discourse, see Chapter 2.

this separation from non-mainstream climate change science, A. Steiner continued his briefing by recalling that the IPCC 4th Assessment Report acknowledged that *'climate change is happening and accelerating'*.⁵¹¹ From this standpoint, he followed Ban Ki-Moon's consideration that the traditional approaches to the issue of climate change are becoming insufficient, and asserted that *'we have to recognize that climate change is an issue that needs to be viewed not just from a scientific and technological perspective of managing carbon emissions, but truly from a geopolitical and security perspective'*.⁵¹² Moreover, he set the basis for a strong argument bridging the gap between apparently opposed conceptualizations of climate change as a sustainable-development issue, on the one hand, and as a security issue, on the other hand. Climate change security impacts, he explained, are *'beginning to undermine the tenuous gains we have made in terms of sustainable development (...). Many of the sustainable development objectives, ambitions and pathways that nations have pursued are under threat beyond what traditionally have been the means of a national sovereign State to determine policies within its territory'*.⁵¹³

The introduction to the debate offered by these first two speakers set the tone of the debate as well as the main lines from which the position of the fifteen permanent members of the Council would depart; it was followed by the statements of the fifty non-permanent members invited to participate in the debate without the right to vote.

4.2. Climate Change and International Security: A Discourse in Progress

4.2.1. Dilution of the Proponents/Opponents Divide

In contrast to the 2007 inaugural debate of the Security Council, the 2011 debate was characterized by the dilution of the originally sharp division between the former 'proponents' of the link between climate change and international security and its fervent 'opponents'. Within the latter category, no one continued to deny the existence of security implications stemming from climate change. Rather, their opposing arguments focused on the unsuitability of the Security Council as the right forum for such debate, which was also marked by a surprisingly high number of ambiguous statements, revealing the existence of unclear

⁵¹¹ IPCC, 4th Assessment Report, *supra*: *'[W]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level'*, at 30; and *'[T]here is high agreement and much evidence that with current climate change mitigation policies and related sustainable development practices, global GHG emissions will continue to grow over the next few decades'*, at 44.

⁵¹² S/PV. 6587, at 6.

⁵¹³ *Ibid.*

positions (possibly undergoing evolution). As a result of the relaxation of the previously polarized positions, the security perspective on climate change reached a higher level of complexity during the debate. Sharpened and nuanced arguments, as well as the foundations for a common standard of acceptance, were presented, consolidating the previous resignification of the Discourse.

When the call in favour of approaching climate change from a security perspective was launched in 2007, it was partly been seen as a temporary strategy seeking to ensure stronger leverage at the UNFCCC negotiations. Mainstreaming climate change within high politics and highlighting the overwhelming consequences of climate change impacts on the stability of inter-State relations could give a stronger sense of urgency and of the need to develop an effective adaptation framework. Yet, the persistence of this perspective since 2007, coupled with the limited parallel progress of the climate change negotiations for the future of the regime post-2012, reaffirmed both the political awareness and the commitment of an important group of countries and the objective need to begin to address climate change impacts from an alternative (security) perspective. Once again, the existentialist claims constituted the strongest calls in favour of this perspective. On this occasion (as in the 2009 General Assembly debate that led to the adoption of UNGA Resolution 63/281), the leading voice was that of M. Stephen, President of Nauru, who spoke on behalf of the Pacific Island States, the Seychelles, the Maldives and Timor-Leste. President Stephen was the first participant invited to speak by the president of the session, once the 15 sitting members of the Council had delivered their statements (more precisely, after the German statement in defence of its concept paper). He grounded the necessity of beginning to address climate change from a security perspective on the insufficient effectiveness of the international regime on climate change in halting the multiplication of the impacts stemming from the phenomenon; he also recalled that Security Council practice had recognized the necessity of addressing the root causes of conflict, including 'unconventional' security threats.⁵¹⁴ *'Today', – M. Stephen stated – 'we ask no less of the Council'.*⁵¹⁵ Nauru's statement was openly and fully endorsed by all other participating Pacific Island States, and notably Papua New Guinea, Fiji and Palau which added their own 'existential claim'. While Papua New Guinea upheld directly cited parts of President Nauru's statement,⁵¹⁶ Fiji insisted on how climate change poses a

⁵¹⁴ *Ibid.*, at 22: *'[W]e must now come to terms with an unsettling reality: there is so much carbon dioxide in the atmosphere that serious impacts are now unavoidable, and we must prepare (...) Even with an ambitious new agreement to address climate change, many of these impacts are now unavoidable.'*

⁵¹⁵ *Ibid.*, at 23.

⁵¹⁶ *Ibid.*, at 18.

threat to their territorial integrity and, therefore, to their '*very existence as sovereign States*' and warned of the '*potential domino effect*' for national, regional and international security which ignoring the real threats posed by climate change could imply.⁵¹⁷ Palau in turn firmly reproached the opponents of the debate, stating that '*the Pacific small island States are in the red zone. Perhaps if others stood on their vanishing shores, they would better appreciate the situation.*'⁵¹⁸ Moreover, the claims of Pacific Island States were supported by their developed regional neighbours. Consistent with its previous positions, Australia considered that '*the effects of climate change could reshape the future global security environment*'⁵¹⁹ and explicitly mentioned the resettlement of people which had been undertaken in Majuro, capital of the Marshall Islands, as a result of the increased inhabitability of the coastal zones. New Zealand followed up on Palau's line of argument, stating that '*for those low-lying small island States [c]limate change poses the ultimate risk – that of ceasing to exist as States and as communities. Debates about whether this constitutes a legitimate topic for discussion **cannot but seem rather abstract and deeply divorced from the severity and urgency of the challenges they face***'.⁵²⁰

The response to this set of existential claims from countries opposed to approaching climate change from a security perspective, essentially focused on the forum in which the discussion was taking place. In other words, opponents in the 2011 debate argued, once again, that the Council was acting *ultra vires*, and that integrating climate change into its agenda constituted an encroachment on the competence granted by the United Nations Charter either to other UN organs (in particular, the General Assembly) or to the multilateral environmental agreements adopted within the UN framework (UNFCCC and Kyoto Protocol). Opposition to the celebration of the discussion before the Council was again headed by the G77+China group.⁵²¹ Represented by the Argentine delegate, the group highlighted the view that such interest in and concern over the impacts of climate change was inconsistent with the lack of

⁵¹⁷ S/PV.6587 (Resumption 1), 20 July 2011 (3 p.m.) at 36. As already pointed out in the previous section, Fiji had already made clear this resignification of the Climate Change and International Security Discourse on 3 June 2009, before the General Assembly. In 2011, the description of what the threat to the continuation of statehood represents for Pacific Island States was developed even further: '*[T]he preservation of our nations' territorial integrity and our very existence as sovereign States faces far greater threats from the adverse impacts of climate change than from human conflict or other atrocities*'.

⁵¹⁸ *Ibid.*, at 26.

⁵¹⁹ S/PV.6587, at. 24

⁵²⁰ S/PV.6587, (Resumption 1), at 5. [Emphasis added].

⁵²¹ S/PV. 6587, at 27: '*[T]he ever-increasing encroachment by the SC on the roles and responsibilities of other principal entities of the UN represents a distortion of the principles and purposes of the Charter, infringes on their authority and compromises the rights of the general membership of the UN*'.

any 'clear indication on the part of developed countries that they will adopt a second commitment period under the Kyoto Protocol'.⁵²² This point seems to imply the 'imperialistic bias' or 'interest-based nature' of the reasons that feed developed countries' support and insistence on the need to begin approaching climate change from a security perspective.

Apart from the generally opposing argument laid down by the G77+China group, more concrete arguments have been developed since the 2007 inaugural debate. For instance, the position of the BRICS countries, comprising the four biggest emerging countries, which were all sitting on the Council in 2011, evolved substantially – from denying the existence of the security implications of climate change (going so far as to express doubts as to the scientific basis of such contentions), to a position centred mainly on the procedural argument concerning the limits of the Council's competences. The Brazilian criticism of the encroachment by the Council on the competences of other organs was ethically grounded, considering that it is crucial to ensure '*an equitable, balanced and effective solution*', and recalling how the basic principles of the climate change regime were agreed upon to respond to this purpose (e.g. common but differentiated responsibilities and respective capabilities).⁵²³ Furthermore, Brazil linked the possible effects of climate change on the aggravation of the disputes over scarce resources to the situation of underdevelopment, lack of access of the country at stake to resources and technology for adaptation, or, in other words, with a State's previously high vulnerability and low resilience.⁵²⁴ It thus stressed the link between development and security while, in contrast, considering that the connection between climate change and security was only indirect.⁵²⁵ Finally, Brazil argued that security concepts or tools were inadequate and inappropriate to address complex and multi-dimensional issues such as climate change.⁵²⁶ Moreover, the Chinese view in 2011 was consistent with – if not identical to – the position it had previously expressed in 2007 and 2009; although climate change '*may affect security*,' the Chinese statement held, it remains '*primarily*' a sustainable development issue.⁵²⁷ China also alluded to the lack of legitimacy of the Council as a forum lacking universal representation for decision-making and considered – in tune with the position of the

⁵²² *Ibid.*

⁵²³ S/PV. 6587, at 8.

⁵²⁴ *Ibid.*: '[S]ecurity tools are appropriate to deal with concrete threats to international peace and security, but they are inadequate to address complex and multidimensional issues such as climate change'.

⁵²⁵ *Ibid.*: '[T]he links between climate change and development and between security and development are clear and have been explicitly recognized by the UN. The possible security implications for climate change, however, are far less obvious.'

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*, at 9.

G77+China group – that *'it is the general belief of the majority of developing countries that the Council's discussion on climate change will neither contribute to the mitigation efforts of countries nor assist affected countries in effectively responding to climate change'*.⁵²⁸ Besides, following up the last argument of Brazil, the Chinese delegate argued that the Council's capacity was unsuited and inappropriate to deal with this matter, since it lacks expertise as well as the necessary means and resources to tackle the issue of climate change.⁵²⁹ The Indian statement began by expressing scepticism about the lack of reliable scientific grounds that may confirm the existence of a causal relationship between the security issue and climate change. While acknowledging that *'climate change, in an overarching sense, is beginning to impact the security of the global community in the same way as poverty, food security and underdevelopment'*, it considered that *'sweeping generalizations (...) are, however, yet to be fully tested against empirical and scientific analyses'*.⁵³⁰ Yet, General Assembly Resolution 62/281 seemingly had an effect on the Indian position, for only sea-level rise was recognized by the Indian delegate as a present reality, along with *'deeply worrisome'* issues of statelessness and the displacement of people.⁵³¹ Most importantly, when supporting the Brazilian and Chinese argument that the Council did not have the appropriate tools to deal with an issue such as climate change,⁵³² India went a step further, clearly stating that *'the existential threat to island States or the emergence of food insecurity as a result of climate change cannot be resolved or remedied by the Council under Article 39 of the UNC'*; this was an indirect but clear means of recognizing the existence of those threats as being derived from climate change.⁵³³ Finally, the intervention of South Africa deviated from the core contentions of the BRICS countries (of which it is nevertheless a member), by delivering a statement that was much more ambiguous than those of its BRICS partners; this was surprising, since it illustrates the extent to which the proponents/opponents divide that had structured the 2007 Security Council debate had become diluted by 2011 as a result both of the operation of the Climate Change and International Security Discourse before UN organs, Specialized Agencies and Institutions and of the parallel circulation of the Discourse from the EU to the most vulnerable countries, including the AU. Considering that the celebration of this debate was

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*, at 18.

⁵³¹ *Ibid.*, at 19: *'[S]ea-level rise, on the other hand, is happening'*. [Emphasis added].

⁵³² *Ibid.* *'[I]n this context, it is worth keeping in mind that while the Security Council can debate the issue and **may recognize the vulnerabilities and threats induced by climate change**, it does not have the wherewithal to address the situations.* [Emphasis added].

⁵³³ *Ibid.*

'timely and opportune to highlight the reality of climate change and the threat it poses to African and developing countries in general and to the small island developing States and least developing States in particular', South Africa concluded with the eclectic idea that climate change threatens *'not only development prospects and the achievement of sustainable development, but also the very existence and survival of societies'*.⁵³⁴ The most fervent and provocative calls against a debate on approaching climate change from a security perspective in the Security Council did not, however, emerge from the BRICS countries. As previously pointed out, the BRICS opposition was rather mild and essentially grounded on the problem of the division of competences among UN institutions, coupled with a slightly sceptic or prudent look at some of the statements on the factual links between climate change impacts and security. Yet, their overall opposition can be said to have decreased since their first statements were delivered in 2007.

In contrast, the most fervent positions – politically and ethically – against the subject of debate came from four of the ALBA countries. While expressing full solidarity with small island States and openly embracing the view that climate change *'is a genuine threat to the existence of humanity'*, and considering that climate change *'has a security dimension because many States may disappear and new conflicts will emerge due to the effects of extreme temperature change'*,⁵³⁵ Bolivia fervently opposed the view that this subject should be addressed by the Security Council. The main argument supporting this opposition was, Bolivia sustained, the fact that the Security Council is an organ in which five of the largest emitters of GHGs are precisely the ones benefitting from an extraordinary and powerful position, holding a permanent seat as well as the right to exercise their veto.⁵³⁶ At the end of its argument, Bolivia eloquently posed the question: *'given those conditions, is it possible for the Security Council to adopt resolutions on sanctions or reparations that effectively hold those countries responsible for the damage they are causing?'*⁵³⁷ Finally, not only did Bolivia underscore the view that only the General Assembly was legitimized to tackle all dimensions of climate change, it also innovatively claimed that a new body ought to be created, one tasked to *'judge and sanction countries that fail to reduce their emissions of GHGs, because **they are provoking***

⁵³⁴ *Ibid.*, at 17.

⁵³⁵ S/PV.6587 (Resumption 1), at 25.

⁵³⁶ *Ibid.* 26: *'The security aspect of climate change should be dealt with in a forum where **the guilty States** do not possess permanent seats or the right to veto'*. [Emphasis added].

⁵³⁷ *Ibid.*

genocide and ecocide against Mother Earth.⁵³⁸ The path opened up by the Bolivian representative was soon followed by Venezuela, which considered that the procedure was inconsiderate as well as another example of the exclusive nature of the Security Council's decision-making.⁵³⁹ With an easily perceptible ironic tone, the Venezuelan delegate stated that his delegation was concerned about the *'hypersensitivity shown by members of this body on issues beyond their competence'*, a position which strikingly contrasts, Venezuela held, with the omission from or disregard of such members in discussion of initiatives seeking to legitimate and make more transparent the work of the Council.⁵⁴⁰ On these grounds, Venezuela became the only State out of the 65 participating in the debate that formulated its opposition as a clear rejection of the German initiative, and closed its statement by forcefully holding that *'the increasing infringement by the Security Council of the functions and responsibilities of other main organs of the United Nations is a distortion of the purposes and principles of the Charter and is an abuse of authority that affects the rights of most Members of the UN.'*⁵⁴¹ While Ecuador seemed to choose a lower profile, avoiding the use of confrontational language and simply restating its *'belief in the need to work to achieve agreements based on the already existing instruments,'*⁵⁴² Cuba embraced a more visible position and adhered to the view of those countries opposing the choice of forum to discuss the German initiative. Thus, its statement emphasized once again the need to respect the respective powers and functions of the various United Nations bodies and expressed serious concern about the Security Council's *'growing interference in the functions and responsibilities of the other principal UN organs.'*⁵⁴³ While considering climate change as being, *'by definition'*, an issue falling within the concept of sustainable development, Cuba then adopted a more pragmatic position. Perhaps anticipating that the release of a Presidential Statement on the issue was unavoidable, Cuba made the basic point that the Statement should incorporate the words *'if the Security Council, despite its limitations and lack of jurisdiction'*, and wished to approve it.⁵⁴⁴ Hence, considering climate change as a global threat that requires global solutions that are just, equitable and balanced, three basic points – which somehow operated as informal amendments to the Presidential Statement – were raised, so as to incorporate

⁵³⁸ *Ibid.* Note that the use of linguistic violence to characterize the situations mirrors that of President Museveni. [Emphasis added].

⁵³⁹ *Ibid.*, at 35.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*, at 11.

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

safeguards ensuring that the German initiative would not open the door to developed countries to circumvent the grounding principles of UNFCCC as well as the specific obligations accepted under this instrument. First, Cuba asked for the principle of common but differentiated responsibilities to be emphasized and the importance of developed countries in meeting their development commitments underlined. Second, it insisted that the Presidential Statement should urge industrialized countries to undertake a second commitment period under the Kyoto Protocol, recalling that the goal of reducing GHG emissions by countries of the South cannot be formulated in a way that may obstruct their right to development. Finally, Cuba called for introduction into the text of an explicit recognition of the fact that unsustainable production and consumption patterns prevail in developed countries.⁵⁴⁵

In contrast to, and notwithstanding, the sustained and still polarized opposition of Venezuela and Bolivia, the ambiguous positions of many members of the G77+China group, of the Non-Aligned Movement (represented by Egypt) and of the Group of Arab States (represented in the debate by Kuwait) may be considered as the clearest example of how the dividing lines between proponents and opponents of approaching climate change from a security perspective had become watered down. The only State from the Non-Aligned Movement that radically opposed the German initiative was Iran, which emphasized the argument of ALBA and BRICS on the encroachment of the Security Council on the mandates of the other principal organs defined in the UN Charter and advised continuing to address climate change from a sustainable development and not a security standpoint.⁵⁴⁶ Finally, the Group of Arab States, represented by Kuwait, also held an ambiguous position tending to favour some substantial aspects of the German initiative, recognizing and stressing the potential consequences that adverse climate change effects would have on the Arab region – especially in arid and semi-arid areas. Nevertheless, they supported the statements of the G77+China group and the Non-Aligned Movement against the choice of forum for debate and embarked on a detailed historical account of the United Nations Charter's interpretation of the division of competences between the Security Council and the General Assembly.⁵⁴⁷

All in all, the two pillars of the opposition to the German initiative essentially relied on:
(1) the issue concerning the division of competences between the Council and the Assembly

⁵⁴⁵ *Ibid.*, at 12.

⁵⁴⁶ (Resumption) *Ibid.*, at 19.

⁵⁴⁷ *Ibid.*, at 20. Thereby, recalling the meaning of UNGA Res. 377/V, 'Uniting for Peace' of 3 November 1950 (on the overlap of the role of the Security Council with the roles and responsibilities of the other principal bodies), the Group of Arab States considered that the discussion does not conform to the principles and purposes of the United Nations Charter and '*may infringe on the authority of those bodies and the rights of Member States as a whole.*'

and potential mutual encroachment; and (2) the negative side-effects and circumvention of the grounding principles and obligations of developed countries (some of which are also permanent members of the Council) within the climate change regime. In contrast, recognition that climate change impacts constitute a security issue, particularly an existential threat for small island States, reached an unprecedentedly high level of acceptance which even encompassed States that were against using the Security Council as a new forum to tackle this issue. Therefore, as this common denominator was settled, responses to the former objections could flow more easily.

4.2.2. Consolidation of a New Understanding and Adoption of the 2011 Security Council Presidential Statement: Starting Point of a New Security Council Practice?

Responses to the opposing arguments of a procedural nature essentially held that rather than constituting an encroachment by the Council on the competences and functions of other UN organs and institutions, the Council's actions regarding the security aspects of climate change were *complementary* to those of the General Assembly and the relevant UN Specialized Agencies. Recalling the under-developed work of the latter on the security aspects of climate change, it became difficult for opponents to argue that such encroachment really existed. The President of Nauru clearly specified how the division of competences between UN organs operates in this situation: *'make no mistake: the UNFCCC is and must remain the primary forum for developing an international strategy to mitigate climate change, mobilize financial resources and facilitate adaptation, planning and project implementation. The General Assembly must continue to address the links between climate change and sustainable development. Likewise, the Security Council has a clear role in co-ordinating a response to the security implications of climate change'*.⁵⁴⁸ To support this argument, the second involvement of the Security Council with the climate change issue can be characterized as pursuing the implementation of General Assembly Resolution 63/281, which called upon all relevant organs of the UN, *'within their respective mandates'* to *'intensify their efforts to address climate change, including its possible security implications'*.⁵⁴⁹ A final comparison of the level of danger that climate change represents today for small island States, with the threat that the nuclear age once represented, finally closed M. Stephen's intervention, in which he recalled that *'neither nuclear proliferation nor terrorism had ever led to the disappearance of an entire*

⁵⁴⁸ S/PV.6587, at 23.

⁵⁴⁹ UNGA Res. 63/281, *supra*, paragraph 1 of the operative part.

nation, though that is what we are confronted with today'.⁵⁵⁰ The statement delivered by the EU through its Spanish representative, Pedro Serrano, reaffirmed the EU's consistent characterization of climate change as a 'threat multiplier', as defined in the 2008 Paper from the High Representative and the European Commission to the European Council on Climate Change and International Security.⁵⁵¹ Moreover, it was also the occasion to clearly unveil before an UN organ the close support of and the alliance between the EU and the Pacific Island States on this matter. Hence, the delegate explained that the EU and its Member States were '*working on how to enhance the EU–Pacific development partnership*',⁵⁵² and underscored the view that the EU remained '*committed to broadening its understanding and mainstreaming of climate change and its security implications in its foreign and security policies*'.⁵⁵³ The statements delivered by individual EU Member States focused on firmly defending the complementarity argument and contended that the security implications of climate change must proceed in tandem with action to address the phenomenon itself. Thus, in response to the main Brazilian and Chinese opposing argument, the French position held that '*the Council is not infringing on the competence of other UN bodies and does not want to replace other forums, in particular that under the Convention on Climate Change*'.⁵⁵⁴ Seemingly, in reply to the Argentinean contention that the Council was unprepared to deal with the inherent complexities of climate change, France argued that '*the Council is simply facing up to a new type of threats that are multiform, complex and diffuse. In that spirit we are **exploring** today the implications of these threats and the Council's capacity to deal with them*',⁵⁵⁵ and interestingly recalled how a few months earlier, when the Security Council was under Brazilian Presidency, a useful debate had been held on the links between peace, security and an equally complex and multiform issue as development. Henceforth, the French position stressed that the Council was only developing its functions in the area of conflict prevention (as had been developed since the late 1990s) and regretted the incoherent reactions of emerging States'.⁵⁵⁶ A final morally grounded touch was added to the closing of the French position, '*to oppose with bureaucratic concerns the anguished appeals by our partners threatened by climate*

⁵⁵⁰ S/PV. 6587, at 23.

⁵⁵¹ European Union, Climate Change and International Security: Paper from the High Representative and the European Commission to the European Council, 14 March 2008, *supra*, paragraph 3. For a detailed assessment on the origins and effects of such Report, see Chapter 2, Section 2.2.2 above.

⁵⁵² S/PV. 6587, at 30.

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*, at 15.

⁵⁵⁵ *Ibid.* For an account of the origins of the Security Council's involvement with conflict prevention strategies, see *supra*, Section 2.1. [Emphasis added].

⁵⁵⁶ *Ibid.*

change does not rise to the issues at stake. It is not dignified'.⁵⁵⁷ The United Kingdom also supported the French defence of the complementarity argument, though in slightly more diplomatic terms. It agreed with the concerns voiced by some delegations over the Council's mandate to discuss this issue and that it was important that the different roles, functions and mandates of the various UN bodies dealing with climate change are fully respected. Yet, the UK stated, *'like the Secretary-General and Mr. Steiner, we do not believe that this debate in any way undermines them*'.⁵⁵⁸ The interventions of Slovenia, Denmark, Luxembourg, Ireland, Belgium and Spain followed the same path traced by the two EU members with a permanent seat on the Security Council. Only Portugal disassociated itself from the EU position and, possibly led by its historical allegiance as former colonial ruler of Brazil, aligned with the positions expressed by the BRICS countries.⁵⁵⁹ Moreover, the complementarity argument also received support from countries which stood aside from the views of the G77+China group, the Non-Aligned Movement and the Arab Group. For instance, Singapore held that the link between climate change and security was now accepted and that the aim of the debate was not to prejudge the ongoing negotiations in the UNFCCC; it was therefore the *'time to continue with the 2007 United Kingdom initiative*'.⁵⁶⁰ Similarly, Lebanon recalled that, although the responsibility within the UN system regarding sustainable development issues – *'including climate change*' – lay with the General Assembly and ECOSOC and that the UNFCCC was the key mechanism for addressing climate change, the 2011 debate *'should be viewed as an expression of complementarity in the work of different organs of the UN*', pursuant to the relevant articles of the UN Charter and of General Assembly Resolution 63/281.⁵⁶¹ This procedural opposing argument was the main cause sustaining some degree of division between the developed and developing countries.

In contrast, as already pointed out, substantive objections to linking climate change and security, which had been raised in 2007, became very much diluted; by 2011, virtually none of the participating countries had any trouble acknowledging that climate change may have security implications and that small island States, in particular, were subject to such a connection. Yet, recognition that the endangered statehood of small island States constitutes a

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*, at 12.

⁵⁵⁹ *Ibid.*, at 20: *'As I have repeatedly stated, Portugal does not see the Security Council as the forum for climate change negotiations or even for discussions on measures to mitigate and adapt to environmental vulnerabilities. These issues belong in other contexts that **have the legitimacy and the appropriate tools to address them***'. [Emphasis added].

⁵⁶⁰ S/PV. 6587 (Resumption 1), at 15.

⁵⁶¹ S/PV. 6587, at 16.

security concern and that such concern is a result of climate change impacts did not resolve the question of how climate change should itself be defined by the Security Council. Thus, divergent considerations remained outstanding on whether climate change was associated only with other existing threats to international peace and security or whether it should be understood as an autonomous threat multiplier or whether it constituted a fully distinct threat in itself.

The view that climate change should be associated with issues that had been already securitized was most clearly upheld by Japan. Following a syllogism which simultaneously associated development and security, on the one hand, and climate change and development, on the other, the Japanese representative concluded that climate change is linked to security in so far as climate change impacts limit the attainment of sustainable development objectives – which in turn are a recognized factor of national and regional instability.⁵⁶² To some extent, this basic syllogism was the benchmark from which the position of most EU Member States and the United States departed, although the latter took a step forward by considering climate change not only as a factor of previously recognized securitized issues, such as development, but also as an autonomous issue deserving a distinct treatment. Thus, while the UK – apparently following the Japanese position – acknowledged that *‘food, water, energy and climate security are interlinked’* and that they *‘demand a coordinated response’*⁵⁶³, it maintained the position already laid down in the 2007 British concept paper and reaffirmed that *‘it is in that context that climate change must be seen as a **threat multiplier**, exacerbating existing tensions and increasing the likelihood of conflict’*.⁵⁶⁴ Vastly reducing the association between climate change, security and energy issues that had been presented in 2007, the UK position correlatively focused on issues of statelessness, population migration, global resource scarcity and competition for natural resources, all exacerbated by climate change impacts. Only Poland maintained the original straightforward association of the Climate Change and International Security Discourse with energy security, recalling that the roots of the Discourse

⁵⁶² S/PV. 6587 (Resumption 1), at 15: *‘[M]y delegation underscores the importance of the nexus between climate change, development and security’*. The Japanese representative also upheld the need to further promote global co-operation in disaster risk-reduction by *‘establish[ing] a new international strategy to succeed the Hyogo Framework for Action 2005–2015.’* To contribute to this endeavour, the Japanese delegate announced that a third session of the Global Platform for Disaster Risk Reduction would be organized in 2012 on large-scale natural disasters.

⁵⁶³ S/PV. 6587, at 12.

⁵⁶⁴ *Ibid.* [Emphasis added].

can be traced back to its institutionalization in the EU.⁵⁶⁵ Other EU Member States referred to climate change as a threat multiplier. For instance, France alluded to the general impacts of climate change as having *'an immense destabilizing potential and **could multiply** the threats to peace and security in the most fragile regions and States'*.⁵⁶⁶ Similarly, the USA welcomed the German initiative – proof of the evolution of the Discourse in the UN since 2007 – and, recognizing that climate change *'can erode State capacity'* and raise the *'spectre of new and previously unimagined forms of statelessness'*, urged the Security Council to begin acting *'on the understanding that **climate change exacerbates the risks and dynamics of conflict**'*.⁵⁶⁷ Such institutional endeavour, the U.S. representative added, would be consistent with previous Security Council practice with regard to emerging security issues and which had previously led the Council to explore, inter alia, the link between development and security as well as the security implications of HIV/AIDS. The closing statement of the USA thus held that failure of the Council to reach a consensus, by acknowledging in its Presidential Statement only *'that climate change has the potential to impact peace and security, in the face of the manifest evidence that it does'*, would, the U.S. delegate said, be *'more than disappointing, it is pathetic, short-sighted and, frankly, a dereliction of duty'*.⁵⁶⁸ Finally, following the conceptual escalation, the definition of climate change as a self-standing threat to international peace and security was most prominently advocated by the UN Secretary-General who, as previously pointed out, opened the 2011 debate by stating that climate change *'not only exacerbates threats to the international peace and security, it is a threat to the international peace and security'*.⁵⁶⁹ Consistent with previous statements delivered in 2007 and 2009, Pacific Island States upheld the same view. Palau for instance insisted that *'while the causes **of this threat** are novel, the effects which endanger the sovereignty and territorial integrity of Member States fit squarely within the Council's traditional mandate'*⁵⁷⁰, along with Fiji's eloquent contention that *'the threat posed by climate change is politically blind. Its consequences can be far greater than any*

⁵⁶⁵ S/PV. 6587 (Resumption 1), at 37. *'Let me now turn to the energy issue. Competition over access to, and control over, energy resources is one of the most significant potential sources of conflict. Since much of the world's strategic energy reserves are in regions that are vulnerable to the impacts of climate change, instability is likely to increase.'*

⁵⁶⁶ S/PV.6587, at. 15. [Emphasis added].

⁵⁶⁷ *Ibid.*, at 7. [Emphasis added].

⁵⁶⁸ *Ibid.* This position was also upheld by Papua New Guinea, which held: *'[W]e would argue that the same purposive approach as that employed in the HIV/AIDS and development issues by the Council, respecting the mandates of all relevant United Nation agencies and organs, should be employed to address the security implications of climate change.'* *Ibid.*, at 19.

⁵⁶⁹ *Ibid.*, at 3.

⁵⁷⁰ S/PV.6587 (Resumption 1), at 27.

battle fought'.⁵⁷¹ Interestingly, France – which had referred to climate change as a threat multiplier, in accordance with the EU's and EU Member States' positions – recognized climate change as *'a threat for our small island Pacific State partners, whose very existence is in peril, as is the survival of their territory, culture and identity'*.⁵⁷²

The importance of the form in which climate change may be determined by the Security Council lies in the fact that such definition potentially conditions the subsequent actions that the Council may take with regard to the issue at stake. During the debate, some States pointed out the concrete measures that could and should follow the consideration of climate change as a security issue by the Security Council. Nauru, for instance, named a range of *'concrete steps'* that would progressively operate a shift of the organ *'from a culture of reaction to a culture of preparedness'*.⁵⁷³ Thus, the *'absolute minimum actions'* suggested by Nauru included the appointment of a special representative on climate and security – who would bear the primary responsibility of analysing the projected security impacts of climate change, so that Council and Member States could be well informed, and the call to the Secretary-General by the Security Council for an assessment of the capacity of the UN system to respond to such impacts so that vulnerable countries can be assured that they are up to the task.⁵⁷⁴ The USA also made concrete proposals, which referred to the need to improve early warning systems, foster collaboration on the effects of climate change – *'especially at the local and regional levels'* – and improving information on basic human needs (water, food, livelihood and energy), so that resource-driven conflicts could be anticipated and prevented.⁵⁷⁵ Last but not least, France pointed out the necessity of the Security Council's taking into account the impacts *'of its own decisions'* on the vulnerable environments where its operations may take place. It therefore held that the Security Council *'must, as of today, take measures to ensure that peacekeeping operations reduce their carbon emissions and their impact on the environment'*.⁵⁷⁶

Although the 2011 debate did not produce a large number of innovative measures, important advances may be noted. The Security Council Member States were finally able to reach an agreement and adopted by consensus a Statement by the President of the Security Council regarding the Council's consideration of the impact of climate change under the

⁵⁷¹ *Ibid.*, at 36.

⁵⁷² S/PV.6587, at 15.

⁵⁷³ *Ibid.*, at 23.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*, at 7.

⁵⁷⁶ *Ibid.*, at 15.

agenda item 'Maintenance of international peace and security'.⁵⁷⁷ Reaffirming the primary responsibility of the Security Council for the maintenance of international peace and security (pursuant to Article 24 of the UN Charter), the Statement began by stressing *'the importance of establishing strategies of conflict prevention'* and thus apparently sought to locate any future treatment of climate change within the framework of prior Security Council practice. The Statement then engaged with the issue of the division of competences between the Security Council and other UN organs regarding climate change. It then went on to recognize the responsibility for *'sustainable development issues, including climate change'*, conferred upon the General Assembly and ECOSOC.⁵⁷⁸ The Security Council's point of departure thus characterized climate change as a development issue, an approach which shows the carefulness displayed by the Council not to distort the original characterization of the phenomenon – as understood since the outset of international co-operation on climate change in the early 1990s. Indeed, the wish to establish a complementarity between the existing efforts of the international community to tackle climate change and the new involvement of the Council with the phenomenon is particularly stressed in paragraph 3 of the Statement, underlining how General Assembly Resolution 63/281 recognized the UNFCCC as *'the key instrument for addressing climate change'* while also inviting *'the relevant organs of the United Nations, as appropriate and within their respective mandates, to intensify their efforts in considering and addressing climate change, including its possible security implications'*.⁵⁷⁹ The stress on the fact that the Presidential Statement of the Security Council was not only in tune with the respective actions of the General Assembly, but actually constituted a form of implementation of the recommendation of the Assembly, was reinforced by a reference to General Assembly Resolution 65/159 on 'Protection of Global Climate for Present and Future Generations of Humankind', as well as to the Report of the Secretary-General on Climate Change and Its Possible Security Implications submitted in response to a request of the Assembly.⁵⁸⁰

After setting the institutional framework within which the Presidential Statement ought to be understood, the characterization of the issue at stake, as well as the effects of such acknowledgement, followed. The Statement, explicitly delivered *'on behalf of the Security Council'* and thus arguably representing the view of this body on the issue, expressed the

⁵⁷⁷ S/PRST/2011/15: Presidential Statement on Maintenance of International Peace and Security and Impacts of Climate Change, paragraph 1.

⁵⁷⁸ *Ibid.*, paragraph 2.

⁵⁷⁹ *Ibid.*, paragraph 3.

⁵⁸⁰ *Ibid.*, paragraph 4.

Security Council's '*concern that **possible** adverse effects of climate change **may, in the long run**, aggravate **certain existing threats** to international peace and security*'.⁵⁸¹ This statement invites two main remarks. First, it seems clear that the Security Council wished to avoid the Presidential Statement being interpreted as the recognition of the existence of a causal link between climate change and security, despite the fact that such a connection had not yet been scientifically proved. The joint use of the words 'possible' and 'may' (highlighted in the citation here above) supports this reading of the text. Second, climate change fell short of being defined as a self-standing threat to international peace and security. Rather, the Statement seemed closer to upholding the view that climate change constitutes a 'threat multiplier', although the term was not expressly used. Third, reference to the fact that climate change security impacts may only be discernible 'in the long run' seems coherent with the initial presentation of the Statement inscribing it as part of the previous Security Council practice on conflict prevention. Despite the view that such a general approach to the phenomenon may seem a little ambitious when compared to the level of acknowledgement and shared understanding of the security implications of climate change reflected in the discussion, special reference to the specific way in which small island States are affected by the phenomenon came to counterbalance it, for indeed the Council also expressed its '*concern that possible security implications of loss of territory of some States caused by sea-level rise may arise, in particular in small low-lying island States*'.⁵⁸² Although the possible threat to the continuation of statehood was not explicitly formulated, the mention of the 'implications of loss of territory' supposed a step forward compared to General Assembly Resolution 63/281.

The Council finally considered that '*conflict analysis and contextual information of, inter alia, possible security implications of climate change, is important*', and thus noted that the phenomenon could affect the Council's action in three ways: either when '*such issues are drivers of conflict*'; when they '*represent a challenge to the implementation of the Council's mandate*'; or when they '*endanger the process of consolidation of peace*'. Interestingly, the enunciation of these three forms in which the phenomenon should be analysed in the future by the Council was drafted in the form of a statement without use of the word 'may' or equivalent terms. Climate change was thus recognized by the Council as a phenomenon to be taken into account at each of the three main stages of the Council's action: prevention of conflict (peace-building operations); response to conflicts (enforcement measures under Chapter VI or Chapter VII); and construction of a lasting peaceful post-conflict environment

⁵⁸¹ *Ibid.*, paragraph 5. [Emphasis added].

⁵⁸² *Ibid.*, paragraph 6.

(peacekeeping operations). Presidential Statements of the Security Council are generally considered to be hybrid instruments, falling short of having the legally binding character of Security Council resolutions (covered by Article 25 of the UN Charter), but undoubtedly constituting a stringent recommendation with important political declarative effects. Besides, the Council may incorporate into the Presidential Statement the measures to be carried forwards, either directed at the Security Council itself or at UN Member States *uti singuli*. In this case, the Council chose to merely develop 'in-house' measures and thus requested the Secretary-General 'to ensure that his reporting to the Council contains such contextual information'.⁵⁸³ No concrete actions to be implemented by States were mentioned. The subsequent practice of the Secretary-General in this sense was timidly echoed in his Report on the African Union–United Nations Hybrid Operation in Darfur,⁵⁸⁴ as well as in references to the efforts on disaster risk-reduction and climate change adaptation made in Timor-Leste.⁵⁸⁵

5. CONCLUSIONS

The reconstruction of the Climate Change and International Security Discourse before universal organizations closes the circle initiated in Chapter 2 on the construction and circulation of the Discourse at a regional level, which may ultimately find its roots in the international environmental security precedent described in Chapter 1. Whilst the universal level of analysis focuses on how the Discourse came into operation, the regional level of analysis previously laid down unveils the political forces and alliances lying hidden underneath the table; thus, all three chapters complement each other and help understanding of the

⁵⁸³ *Ibid.*

⁵⁸⁴ Report of the Secretary General on the African Union-United Nations Hybrid Operation in Darfur, 11 October 2011, document reference: S/2011/643, informing in paragraph 27 that: 'The government of North Darfur hosted a peaceful coexistence forum in El Fasher on 24 and 25 July, which was attended by more than 600 participants, including government officials, academics and representatives of various Darfur communities. The participants deliberated on the root causes of conflict, with a focus on environmental challenges, relations between farmers and pastoralists and the role of local conflict resolution mechanisms.'

⁵⁸⁵ Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 20 September to 2011 to 6 January 2012), 18 January 2012, document reference: S/2012/43, indicating at paragraph 50 (under the heading 'humanitarian assistance') that: 'On 1 and 2 December, UNMIT, in cooperation with the Secretary of State for Social Assistance and Natural Disasters and with support from the United Nations Office for the Coordination of Humanitarian Affairs, organized a workshop on disaster risk management, to review the state of preparedness for natural disasters and discuss the contingency planning process. From 20 to 23 November, my Special Representative for Disaster Risk Reduction, Margareta Wahlström, visited Timor-Leste to assist the Government in integrating disaster risk reduction and climate change adaptation strategies into the national development policies and plans.'

different aspects of the emergence of the Climate Change and International Security Discourse.

The present chapter, devoted to the operative dimension of the Discourse, sought to unveil how the introduction of the Discourse before universal organizations had a double-barrelled and reciprocal impact. On the one hand, the purpose-based incorporation of the Climate Change and International Security Discourse into the realm of work of universal organizations reveals the process through which an agenda-setting strategy is turned into concrete political action, either by transforming old patterns of international co-operation or by generating innovative trends. On the other hand, when confronted with a genuinely unlimitedly multilateral setting as the United Nations, the Climate Change and International Security Discourse itself undergoes a process of transformation resulting from political exchange, negotiation and compromise. The 'shared understanding of the world', finally embodied by the Discourse after going through the prism of universal organizations, may thus not fully correspond to its original conception; thereafter, the concrete actions into which the Discourse leads may not match the original purpose of its proponents either.

The process of operation of the Climate Change and International Security Discourse before universal organizations can thus be divided into three main stages. First, the Discourse was introduced before the Security Council as a result of an initiative of the United Kingdom, one of the main 'drivers' of the Discourse which, as explained in Chapter 2, originated in Germany and was then institutionalized at the EU. This was the first contact of the Discourse with the UN organ primary responsible for the maintenance of international peace and security, and took place at a time when the process of institutionalization within the EU was still at a very early stage of development. Its presentation before the Security Council, confronted with other UN Member States that would not be necessarily reached by the inter-regional circulation of the Discourse, was thus closely attached to a geo-political view on how the consequences of the phenomenon could affect several key factors of international security – with special emphasis on its effects on the energy sector. The introduction of the Discourse at a time when the 2007 Bali Summit was under preparation, coupled with its original hegemonic-biased shape, conveyed the idea that it essentially served to exert influence and pressure on the mainstream climate-change negotiations through an alternative (and arguably illegitimate) way. Despite the fact that States threatened by the most extreme impacts of climate change supported the hegemonic initiative for its potential capacity to raise awareness and increase the sense of urgency of the phenomenon, this first attempt to 'securitize' climate change unsurprisingly encountered fierce opposition from States seeking to preserve the

originally grounded developmental rationale of international climate-change co-operation. Then, as the command was taken by Pacific Island States and the Discourse brought to the General Assembly, an important shift in orientation took place. Indeed, in the negotiation leading to the endorsement in 2009 of General Assembly Resolution 63/281 on Climate Change and its Possible Security Implications, the existential plea of these actors tainted the core understanding of the Discourse and truly re-signified it. Besides, the definition of the respective roles that UN organs and agencies were to play in it was also established. Thereafter, the security implications of climate change would be associated, in particular, with the territorial loss and population migration produced by sea-level rise in small island States. This newly fixed understanding of the meaning of the Discourse, as well as the division of competences over this matter among the relevant organs and organizations, was finally consolidated when climate change entered the agenda of the Security Council for the second time, in 2011.

To be sure, the last stage – so far discernible – of the operation of the Climate Change and International Security Discourse before universal organizations only implied that climate change would from now on be considered by the Secretary-General in his description of the contextual information of Security Council operations and did not give rise to concrete measures directed towards UN Member States. Yet, although so far the Discourse has not turned into actions that may significantly modify the behaviour of either the UN or individual Member States towards climate change, a fundamental consequence can be raised in the realm of law. Indeed, the reconstruction of the Climate Change and International Security Discourse has shown how its evolution before universal international organizations led to the recognition that the continuation of small islands' statehood is potentially jeopardized by the looming adverse impacts of climate change. Political consensus exists which considers that this situation embodies and stands out as the core issue unveiled by the Climate Change and International Security Discourse. It is an issue which, by its very subject-matter – the central concept of statehood – undeniably deserves and even requires consideration from an international-law perspective. And thus, as we get to the end of the reconstruction of the Climate Change and International Security Discourse, the point of departure of the next Part of this thesis becomes apparent.

PART II
LEGAL IMPLICATIONS OF THE CLIMATE CHANGE AND INTERNATIONAL SECURITY
DISCOURSE:

CHALLENGES TO THE CONTINUATION OF PACIFIC ISLANDS' STATEHOOD

CHAPTER 4

ADVERSE IMPACTS OF CLIMATE CHANGE ON PACIFIC SMALL ISLAND STATEHOOD:
THE CHALLENGE OF DE-TERRITORIALIZATION

3. INTRODUCTION

2. THE TERRITORIALIZATION OF NATIONHOOD: FUNDAMENTAL FACTOR IN THE CREATION OF STATES

2.1. The Meaning of Territory at the Inception of the Modern European State

2.1.1 From the Feudal Territorialization of Allegiance to the Westphalian Principle of Territorial Sovereignty

2.1.2 The Myriad of Pre-Charter Theories on the Legal Nature of Territory

2.2. The Meaning of Territory in the Creation of Post-Colonial Pacific Island States

2.2.1. Decolonization and the Creation of Pacific Island States: Limited Territoriality Justified by a New Normative Framework

2.2.2. Micro-States in the United Nations: Limited Territoriality Superseded by Active Participation in the International Community

3. SCENARIO 1. PARTIAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: JEOPARDIZING THE MARITIME SPACES OF THE STATE

3.1. Effects of Coastal Geographical Changes on Maritime Rights

3.1.1. Coastal Geographical Transformation and Undelimited Maritime Boundaries

3.1.2. Coastal Geographical Transformation and Maritime Delimitation Agreements

3.2. Preventive and Responsive Measures Against the Loss of Maritime Spaces

3.2.1. Physical Devices: Mainstreaming Coastal-Protection Strategies in National Climate-Change Adaptation Plans

3.2.2. Legal Devices: Protecting Maritime Boundaries by Ratifying Maritime Delimitation Agreements, Fixing Baselines and Effecting Archipelagic Status

4. SCENARIO 2. TOTAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: UNCERTAIN EFFECTS ON THE CONTINUATION OF THE STATE

4.1. Fighting for the Continuation of the State through 'Re-territorialization' Strategies

4.1.1. Land Acquisition by Cession or Purchase from Another State

4.1.2. Merger with Another State

4.2. De-territorialized Pacific Island States: A New Form of *Sui Generis* 'Non-State Sovereign Entity'?

4.2.1. Two Precedents of Existing Recognized Non-State Sovereign Entities: The Holy See and the Order of Malta

4.2.2. Protecting the Pacific Island Nations through the Continuation of the State: Back to the Functionalist Approach to the Role of Territory in the Configuration of Statehood

5. CONCLUSIONS

'For small island States, the security implications of climate change have been, first and foremost, a threat to our very existence as sovereign nations. All else will be immaterial if statehood is lost.'

M. Vunibobo, representative of Fiji to the UN, 85th General Assembly Plenary Meeting, 9 June 2009

'As a ten-year-old, I used to look at the sea with awe, at the seemingly endless supply of fish that I could harvest ... now when I look at it, I wonder how far into the new millennium we will be before it overwhelms our coasts.'

Tamari'i Tutangata, Former Director of the South Pacific Regional Environment Programme, 2000

1. INTRODUCTION

When translating and moving the content of the Climate Change and International Security Discourse from the political arena to that of international law, one first recalls the general concept of threat, as well as the extreme versions of it that can virtually determine the survival of a State. Considering that, as Charles de Visscher recalled, international law is *'devoted above all to order and security'*,⁵⁸⁶ the notions of threat and survival are not unfamiliar to either the international legal order nor to international law as a discipline. In fact, in the classical understanding of the modern European sovereign territorial State, the central function of such a State was precisely to limit war within the frontiers of Europe and thus correlatively to ensure the security of each State's population (or nation) against external threats. Hence, the genealogy of the 'inherent right to self-defence' may, for instance, illustrate well the ways in which the notion of threat has become anchored in international law. Enshrined since 1945 in Article 51 of the United Nations Charter, the right to self-defence is a derived and limited version of the previous concept of self-preservation,⁵⁸⁷ a commanding paradigm of the *ius ad*

⁵⁸⁶ C. DE VISSCHER, *Theory and Reality in Public International Law*, 1968 revisited edition translated from the French by P. E. Corbett, (Princeton, N.J.: Princeton University Press), Chapter 2 (The State in International Law), at 177. Certainly, ever since De Visscher wrote this, the purposes of international law have evolved so as to integrate, today more than ever before, standards of justice applicable not only in inter-State relations, but also in the relations between individuals or between private actors and States. The development of international human rights law and international criminal law, as well as the incursions into the so-called responsibility to protect, are prominent examples of this evolution.

⁵⁸⁷ An explanation of the historical evolution from the right to self-preservation to the narrowest version of the right to self-defence enshrined in Article 51 of the UN Charter, see I. BROWLIE, *International Law and the Use of Force by States*, 1963 (Oxford: Clarendon Press). See also J. WESTLAKE's definition of self-preservation: *'[W]hatever right or action outside the physical limits of its own sovereignty is allowed to a State by these rules may be described as a right of self-preservation [...] Writers on international law often class it among their fundamental, primitive, primary or absolute rights. It is no doubt a primitive instinct, and an absolute instinct in so far as it has not been tamed by reason and law, but one great*

bellum in classical international law and the full expression of the Hobbesian model of State security from the 17th to the 19th century.⁵⁸⁸ Yet, despite the evolution of the law of armed conflict in the 20th century, culminating in the general prohibition of the use of force, provided for in Article 2(4) of the UN Charter and limiting the scope of the right to self-defence, contemporary international law still falls short of regulating a State's behaviour in most worst-case scenarios and circumstances of extreme vulnerability. Thus, whilst the 'national security interest' remains today preserved as a *domaine privilégié* of the State, the assurance of State survival has even been considered by the International Court of Justice in its Advisory Opinion on the *Legality of the Use of Nuclear Weapons*, as a circumstance blurring the existing rules on the use of force so much that the very assessment of the legality of the use of nuclear weapons was impeded.⁵⁸⁹ These are only two prime examples of how the extensive scope of international law is constrained when facing the core protection of its principal and privileged subject, an ambivalence which is connected to the double-edged functionality of the State with regard to the international legal order. Indeed, the State operates as the primary law-maker in the international legal order, whilst constituting the primary *subject* of such order; it is thus a political entity with independent international legal personality which creates the set of rules by which it consents to be bound.⁵⁹⁰

Yet, this notable sensitivity to the heart of the State and the accepted deference towards what J. Westlake called '*the primitive instinct*' of States to preserve their survival seems to have been associated with strong States or even 'big powers'. In fact, it may be that the State,

function of law is to tame it, in L. OPPENHEIM (ed.), *The Collected Papers of John Westlake on Public International Law*, 1914, (Cambridge, UK: Cambridge University Press), at 112.

⁵⁸⁸ This is particularly visible in T. HOBBS' understanding of security laid down in *Leviathan*, See L. FOISNEAU, 'Omnipotence, Necessity and Sovereignty: Hobbes and the Absolute and Ordinary Powers of God', in P. SPINGBORG (ed.), *The Cambridge Companion to Hobbes*, 2007, (Cambridge, UK: Cambridge University Press, 2007).

⁵⁸⁹ '*Legality of the Threat or Use of Nuclear Weapons*' (Advisory Opinion, 1996) I.C.J. Report 226, at 44: '[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court **cannot conclude definitively** whether the threat or use of nuclear weapons would be lawful or unlawful in **an extreme circumstance of self-defence, in which the very survival of a State would be at stake**'. [Emphasis added].

⁵⁹⁰ This is differential trait of international law referred to, from a positivistic standpoint, as a 'consent-based' order. Reliance on State consent in the theory of sources of international law, as enhanced by the formalism and positivism of the Austrian school of the first half of the 20th century has of course been preceded by the natural law school of thought and followed by recent challenges to it from several trends including, inter alia, critical legal studies, feminist critiques or third-world approaches to international law. For a recent reappraisal of formalism in the theory of sources of international law, see J. d' ASPREMONT, *Formalism and the Sources of International Law: an Theory of Ascertainment of Legal Rules*, 2011, (Oxford: Oxford University Press). Yet, our point here is simply to recall the inherent bond between the emergence of the modern State in the 17th century and the emergence of modern international law as an order called on to operate amongst equal sovereign entities, a link which can be apprehended and acknowledged irrespective of the theory of the sources of legal obligations we rely on.

as a power-based structure, is what actually animates the recognition of and respect for such an instinct. In contrast, what the Climate Change and International Security Discourse has unveiled is not only that a State's survival may be threatened by non-traditional war-like threats, but also that the relevant potential targets of this new type of threat are not the traditionally powerful, strong and stable States, but a category of State actors – post-colonial small island States – characterized by their inborn physical, political and economic vulnerability and fragility.

It is perhaps the negative form of the idea of survival – that is, the notion of *disappearance* – which constitutes the central mindset of the second part of this thesis. As a complex and multiform concept, the notion of disappearance essentially carries two connotations. On the one hand, it refers to the threat to the tangible, physical, concrete and material dimension of these States' existence (e.g. the physical submergence of their territory or the displacement of their population); on the other hand, it refers to the threat of their disappearance as political entities which therefore engages with the abstract dimensions of their existence, and necessarily directs the study to the concept of a State as a political construct.⁵⁹¹ Ever since the emergence of the modern State as a new form of social and territorial organization endowed with sovereign prerogatives, the factual and the abstract dimensions of the State have been inseparable.⁵⁹² Part II of this thesis therefore seeks to map the extent and concrete forms of the progressive change, deterioration and loss of the material dimension of small island States resulting from climate change and in particular from sea-level rise. It will then assess the effects that the transformation of the State as a physical entity may have on its continuation as a legal and political concept. Ultimately, its purpose is therefore to assess the operability of the concept of statehood when a State is confronted with a set of extreme environmental conditions, by scrutinizing the correlation between the physical basis of the State and its existence as a political construct.

The first preliminary challenge to be confronted is that of analysing whether the concept of statehood is bound to evolve, disappear, or be redefined in innovative forms in the face of the climate change crisis; such analysis necessarily presupposes that statehood is a conceptually fixed and established institution of the international legal order; in other words, it

⁵⁹¹ This includes the 'external' manifestation of the States' engagement in the international political arena as well as the State's subjective perception of its own distressful situation; that is, its fears in relation to the threats it is facing.

⁵⁹² As Rousseau explains: '[s]i l'on veut sortir de cette équivoque, il faut dans l'État distinguer deux choses, car celui-ci est à la fois un phénomène politico-social et un phénomène juridique', in C. ROUSSEAU, *infra*, at 15.

assumes that we know when an entity 'is or is not a State' and we are able to understand and identify 'what it is made of', clearly depicting its criteria or constituent elements.⁵⁹³ Yet, numerous discussions and heated debates within the discipline indicate how far the concept of statehood is from relinquishing its characteristic 'open texture'. Conveying an awareness of how approximations to the concept of State tend to be incomplete, Charles Rousseau, for instance, borrowed the words of the French poet Paul Valéry, '*les mots de grande importance, ceux qui traduisent les notions fondamentales de la vie sociale, sont en général des symboles vagues, imprécis et indéterminés*'.⁵⁹⁴ The straight dichotomy between constitutive and declaratory theories of statehood and the consequent question of the role of recognition in the creation of States is one clear illustration of the concept's difficult and slippery apprehension of formal legal tools.⁵⁹⁵ So are the more recent critiques of the concept of a State which flourishes in different branches of post-modern literature (from feminist critiques to critical legal studies), as well as voices advocating that a change must be made to replace the State, as the central object of reference of the discipline, by the individual.

Hence, both the concept of State and that of statehood suffer from potential vagueness. They are involved or even subsumed in a stream of constant (and arguably progressive) historicity.⁵⁹⁶ Coming to terms with this assumption, it may be inferred, *a fortiori*, that not only the State itself, but the 'criteria' by which an entity qualifies as such, equally bear the burden of historicity, potential vagueness and lack of preciseness and fixity of their respective contents. Soon before the outbreak of World War I, John Westlake stated that '*a State is a society of men over whom as well as over its territory its sovereignty extends*'.⁵⁹⁷ This positivistic and formalist approach to statehood was first endorsed by early international arbitral tribunals and gained weight after the adoption of the 1933 Montevideo Convention on

⁵⁹³ This corresponds to a rationalistic mindset, which separates the inside from the outside and makes the latter apprehensible by the former.

⁵⁹⁴ C. ROUSSEAU, *Droit international public*, 1970, (Paris: Sirey), vol. II (Les Sujets de droit), at 14-15. Rousseau explains the State as having different faces: the organic aspect of the State; the State as a phenomenon of power; the State as composed of sociological elements; the State in its functional and purpose-based dimension; and finally, the State defined from a legal (positivistic) perspective.

⁵⁹⁵ Both political and conceptual reasons make it difficult to define statehood using formal international legal sources, as recalled by T. GRANT, 'Defining Statehood: The Montevideo Convention and its Discontents', (1999) *Columbia Journal of Transnational Law*, vol. 37, pp. 403-457. The International Law Commission has also failed to work out a draft definition of statehood because of ideological divisions among its members. See also J. CRAWFORD, *The Creation of States in International Law*, 1979 (2nd revised edition, 2006), (Oxford: Clarendon Press).

⁵⁹⁶ For a critique on the role that the notion of progress has played in the development of international law, see T. SKOUTERIS, *The Notion of Progress in International Legal Discourse*, 2010, (The Hague: T.M.C. Asser Press).

⁵⁹⁷ OPPENHEIM (ed.), *supra*, at 127.

the Rights and Duties of States, providing in Article 4(1) that '*a State is an entity with: territory, population, effective government and capacity to enter into international relations*'.⁵⁹⁸ Ever since the Convention was adopted and considered as the codification of statehood each of these criteria has been subject to evolution as new political situations required more nuanced interpretations.⁵⁹⁹

The second challenge of this study is that, for the most part, the formulation of the criteria of statehood has been raised within the context of the *creation*, rather than *extinction*, of State entities because, as Charles Rousseau put it, '*la durée est un élément essentiel de l'État*'.⁶⁰⁰ Creation and extinction of States cannot be dealt with in the same way, for the inherent bias in international law towards stability can be so acute that, as J. Crawford explains, '*a State is not necessarily extinguished by substantial changes in territory, population or government, or even in some cases, by a combination of all three*'.⁶⁰¹ Truly enough, the extinction of statehood is not alien to international law, and its possibility is contemplated under different forms, such as dissolution, succession and secession, which have also served to revive analysis of the role that each criterion of statehood plays in the fate of the entity or entities arising out of such processes. Nonetheless, the challenge represented by climate change is likely to reveal more about the role and nature of the criteria of statehood for one reason: cases of State succession essentially constitute political transformations that trigger a process of redistribution of space among one or several political forces. Yet, such redistribution of the space between political entities has never implied/consisted of the actual loss of the material substratum or physical dimension of the entity (or entities) concerned. It was the political forces operating over the territory which changed, but the territory itself did not move. In contrast, the situation of small island States threatened by climate change impacts involves the transformation of a *space*, which in turn calls for a re-examination of the State as a political and legal construct.

⁵⁹⁸ See for instance the award of the mixed arbitral tribunal in the case '*Deutsche Continental Gas-Gesellschaft vs. Poland*', (1929) *Annual Digest of Public International Law*, vol. 11, which held that '*[U]n État n'existe qu'à condition de posséder un territoire, une population habitant ce territoire et une puissance publique qui s'exerce sur la population et sur le territoire*'.

⁵⁹⁹ For instance, it is nowadays considered that the territory does not have to be necessarily fixed (in cases where boundary delimitation remains outstanding or in dispute with another State), nor to have a minimum extent either. The population size is also irrelevant for a political entity to be considered as a State. See J. DUURSMA, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood*, 1996, (Cambridge, UK: Cambridge University Press); at 110-145.

⁶⁰⁰ ROUSSEAU, *supra*, at 16. See also D. GROSS, 'The Temporality of the Modern State', (1985) *Theory and Society*, vol. 14, n° 2, pp. 53-82; and H. RUIZ FABRI, 'Génèse et disparition de l'État à l'époque contemporaine', (1992) *Persée*, pp. 153-178.

⁶⁰¹ CRAWFORD, *supra*, at 417.

In spite of these two main challenges, Part II of this thesis raises the question of how each of the elements or criteria of statehood is affected, in its material dimension, by climate change impacts in Pacific Island States and how this may impair and possibly threaten the continuation of these entities as States. It examines the consequences of sea-level rise and the changing climate for the continuation of small islands' statehood by assessing the three traditionally considered core dimensions of statehood: territory (the spatial dimension); population (the personal dimension) and governance (the political dimension, both internal and external). While undertaking an analysis in which each of the three criteria are dealt with separately and apprehended historically as an element of the State, the study will also seek to establish the interactions among them, so as to identify concretely where the challenge to the statehood of Pacific Island States arises and to maintain them as part of the overall analysis of statehood.

To do so, Part II of this thesis focuses on the situation of small island States of the Pacific Ocean. The choice of undertaking a regional case-study is based on three main reasons. First of all, among the four States in the world most likely to suffer from the impacts of sea-level rise in their whole territory, three of them (Tuvalu, Kiribati and the Marshall Islands) are located in the south-east Pacific region. References will nonetheless be made at certain points to the policies promoted by the Maldives, the fourth most vulnerable country which is in the Indian Ocean. Secondly, not only are these four States the embodiment of the situation revealed by the Climate Change and International Security Discourse, they are also the primary promoters of the circulation of this approach before universal international organizations, as shown in Chapter 3, above. Undertaking a regional case-study centred on the south Pacific region is therefore an opportunity to check whether the characterization of the situation as presented before international organizations corresponds to reality, by studying the development in terms of coastal protection and population resettlement that has already taken place. Finally, the case of Pacific Island States case facilitates a leap from the particular assessment of the challenges to State survival at a time of global environmental crisis to a general reflection on the concept of State in contemporary international relations and the potential avenues for an evolving role of international law in redefining the contours of its core defining institution.

When assessing the effects of climate change impacts on small Pacific islands' statehood, the spatial unit is the first element to be analysed. The present Chapter is devoted to scrutinizing the effects of the environmental crisis on the spatial dimension of these island

States, encompassing both their territory and the maritime spaces attached to it.⁶⁰² Considering the concept of territory as being historically contingent, this Chapter argues that, when assessing the effects of the adverse impacts of climate change on the territory of Pacific Island States, the circumstances in which their territoriality was acquired may be legally relevant to the determination of the legal consequences of their progressive loss of territory. Therefore, Section 2 of this Chapter begins by digging into the meaning of territory in the definition of statehood by classical international law (when it was linked to the modes and titles of acquisition thereof) and contrasts this original meaning with the differential role that operated when Pacific Islands States came into existence as independent political entities, when the meaning of territory was bound to the end of a history of colonial domination. After considering how the ‘territorialization of nationhood’ has been a fundamental factor in the creation of States and extracting its specific meaning in the context of southern Pacific State-building, Section 3 explores the ‘de-territorialization process’ undergone by Pacific Island States. Such a process is approached by describing first the physical effects of climate change on these States’ land and then focuses on the jeopardy these effects impose on their territory in terms of the State’s dimension as a legal construct, with specific emphasis on their maritime rights. Finally, Section 4 of this Chapter addresses the solutions which have been put forward by scholars and policy-makers to limit the negative impacts of climate change on these States’ ‘threatened statehood’, from both a physical and a legal standpoint.

2. THE TERRITORIALIZATION OF NATIONHOOD: FUNDAMENTAL FACTOR IN THE CREATION OF STATES

2.1. The Meaning of Territory at the Inception of the Modern European State

2.1.1. *From the Feudal Territorialization of Allegiance to the Westphalian Principle of Territorial Sovereignty*

⁶⁰² For an important distinction between the concept of *territory* and the concept of *space*, see P. DE LA PRADELLE, ‘Notions de territoire et d’espace dans l’aménagement des rapports internationaux contemporains’, (1977) *Recueil des Cours de l’Académie de Droit international de La Haye*, tome 157, pp. 415-444, at 427: ‘Le **territoire** désigne, en droit international, une dépendance de l’ordre géophysique du monde, placée sous le pouvoir de disposition et de contrainte de l’État. L’**espace** désigne, au contact des territoires, les dépendances de l’ordre géophysique du monde qui échappent, par nature, à l’emprise de la souveraineté pour être ouvertes à l’accès et aux libertés d’usage de tous’. [Emphasis in the original text]. Furthermore, as La PRADELLE recalls, the emergence of the Latin term for space – namely ‘*spatium*’ – in the XIIth century, preceded that of the term territory – namely ‘*territorium*’ – which only emerged in the XIVth century, *Ibid.*, at 423. See also D. BARDONNET, ‘Les frontières terrestres et la relativité de leur tracé (problèmes juridiques choisis)’, (1976) *Recueil des Cours de l’Académie de Droit international de La Haye*, tome 153, pp. 9-166.

Any international scholar faced with the task of depicting the genesis of the international law as a discipline has the responsibility and the power to decide where to set the starting point. One may choose to conceive the birth of international law as inextricably bound to the emergence of modern European States without looking much further back into the past. Such a view is largely predominant among contemporary western scholars,⁶⁰³ who often single out the 1648 Peace Treaty of Westphalia – certifying formal equality among catholic and reformist European States – as the foundation stone of the discipline.⁶⁰⁴ Yet, others may prefer to interpret the dictum *ubi ius, ibi societas* widely, and consider international law to have existed ever since the organization of humanity into distinct political entities which required a system of common expectations about how the relations amongst them would operate. Though acknowledging that classical international law is inextricably bound to the emergence of the modern State, supporters of this second position include in their assessment the forms taken by international law in the Middle Ages and the Ancient Period. They dig first and foremost into the customs and principles which governed the relationships amongst Greek city-states, and between Rome and its incorporated territories (non-citizens)⁶⁰⁵; they also enter the blurred complexities of feudalism – assessing the contribution of the Holy Roman Empire and the early theologists to the international legal order of the time.

These ambivalent views about the relationship between international law and the State are reflected in the equally unclear relationship between international law and the concept of

⁶⁰³ Yet, the choice of one way or the other – though often driven by a practical need to narrow the subject matter of study – always implies a set of normative assumptions. Modernist scholars tended to take a look into ancient and medieval epochs, partly because the international order founded by the UN Charter had not yet been established. As I. BROWNLIE explains: '*[T]he fact remains that since 1945 the existence of States has provided the basis of the legal order*', 'Rebirth of Statehood', in M. EVANS (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 1996, (Dartmouth: Aldershot), at 5. Also, even nowadays in non-European circles, the reference to Ancient epochs of international law is preferred because it gives an opportunity to write about the contribution of their non European civilizations to the construction of the international legal order. See for instance, A. BECKER LORCA, *Mestizo International Law*, forthcoming in 2013, (Cambridge, UK: Cambridge University Press).

⁶⁰⁴ Several times references to the Westphalia Peace Treaty as the 'landmark' historical *fact* that marked the birth of the new international legal order seem overemphasized and expressed at the expense of a more thorough contextual consideration of the historical *process*.

⁶⁰⁵ Hannis Taylor, writing immediately after the turn of the 20th century, devotes a whole first chapter of his titanic Treatise on the Ancient and Medieval State-Systems, and considered the ancient state as the city-commonwealth, in H. TAYLOR, *International Public Law: a Treatise*, 1902, (London: Sweet & Maxwell, Limited). More recent historical accounts on international law which follow the same in-depth study on the pre-modern times include W. G. GREWE, *The Epochs of International Law*, 2000, translated and revised by Michael Byers, (Berlin, New York: Walter de Gruyter), Chapter 3, pp. 62-81; as well as A. NUSSBAUM, *A Concise History of the Law of Nations*, rev.ed.1954, (Michigan: McMillan), Chapters 1-3, pp.1-59.

territory.⁶⁰⁶ The State operates as a mediator between international law and the concept of territory. Yet, the multiple meanings of territory found in international law also result from the influence of pre-modern legal systems on the Westphalian order. Therefore, to understand the nature of territory and grasp its evolutionary meaning and role in the international system, it becomes necessary to adopt the broad approach which, as put by Hannis Taylor, conceives States as a the result of the Greek, Roman and Medieval systems, three antecedents whose *'individual histories constitute only distinct stages in one unbroken and progressive development'*.⁶⁰⁷

The prominent role of the territory in the configuration of the modern European State is the result of the progressive transformation in the medieval era of the modes by which a chief was entitled to exercise ruling power over the community. The tribal or national concept of sovereignty originally applied by the Teutonic people was not associated with command over a particular portion of the land. Rather, such bonds between the ruler and the members of a people were fundamentally personal and their configuration was conceived around the notion of nation, whose existence was not necessarily associated with a fixed and delimited area.⁶⁰⁸ The historical process by which the 'space' gradually became an important factor in the configuration of sovereignty essentially began with the shift from the elective appointment of a head or a people to an hereditary system – according to which the ruler of the nation is the lord of a portion of the earth's surface where the nation lives.⁶⁰⁹

Although feudalism was still a strongly personal system⁶¹⁰ – Max Weber described it as *'the ruling power of a militarized nobility with manorial rights'*⁶¹¹ – which did not see the full conversion to a territorial allegiance,⁶¹² the latest stage of the feudal period was characterized by the concern and interest of the seigniorial class in the conservation of their socio-economic position as landlords.⁶¹³ Wilhem Grewe thus explains how this evolution impacted the

⁶⁰⁶ See J. BARBERIS, 'Les liens juridiques entre l'État et son territoire: perspectives théoriques et evolution du Droit international', (1999) *Annuaire Français de Droit International*, vol. XLV, pp. 132-147, at 132. Barberis explains that: *'le concept territoire de l'État est en rapport avec celui de "souveraineté territoriale" et le fait d'énoncer une définition de "territoire de l'État" implique, dans une certaine mesure, de donner également une définition de cette dernière'*.

⁶⁰⁷ TAYLOR, *supra*, at vi.

⁶⁰⁸ TAYLOR, *supra*, at vii.

⁶⁰⁹ The personal conception of bonds also in Roman times – *imperium*.

⁶¹⁰ GREWE adds that *'in this respect it carried a Germanic stamp'*, *supra*, at 65.

⁶¹¹ M. WEBER, *Economy and Society [Wirtschaft und Gesellschaft]*, 1922, (New York: Free Press), at 724.

⁶¹² GREWE, *supra*, at 65: *'Medieval politics did not know the particular territoriality of the modern State with its sharply defined territory as both a closed legal area and an exclusive sphere of government competence'*.

⁶¹³ O. HINTZE, *Wesen und Wandlung der modernen Staates*, 1931, at 89, cited in GREWE, *supra*, at 62.

configuration of the legal systems, for '*as the strict personalization of the early medieval tribal codes diminished, areas subject to a single unified law developed, and "the law of the land" replaced the "tribal codes"*'.⁶¹⁴

Ultimately, the most important outcome of feudalization was the birth of the principle of territorial sovereignty, defined by H. Taylor as the basis of '*the modern conception of the State as a nation with fixed geographical boundaries*'.⁶¹⁵ Beyond the commonly accepted assertion that medieval polities fell short of being built upon the principle of territorial sovereignty as modern European States were, scholarly division arises when it comes to depicting the concept of territory of the late feudal order. Its obscure complexities generally invite simplification of the assessment and consideration of two main different views. On the one hand, the patrimonial concept of the medieval polity views the territory as the object of unrestricted rights of private ownership belonging to the lord or sovereign. This view was predominant among German scholars of the 18th and 19th centuries and is based on the notion of *dominium* borrowed from Roman law.⁶¹⁶ In contrast, other scholars emphasize the *imperium* or public power – rather than private ownership – which was vested in the lord or sovereign within the territorial limits of the land he ruled. According to Grewe though, the reality did not completely correspond to either of these views for, as he explains, '*in the Middle Ages dominium referred to a legal institution which belonged to public as well as to private law and which had no precedent in the laws of antiquity*',⁶¹⁷ and the power of control the lord exercised over the land was not *imperium* in the Roman sense either – that is, as '*a plenitudo potestatis*', a comprehensive unified sovereignty from which all of the singular rights of the sovereign were derived'.⁶¹⁸ All in all, what should be rescued from this look into pre-modern times is that feudalism paved the way for the concept of territory to become central in the configuration of the modern European State. Through the gradual overlap of the personal and the territorial character of a nation's bonds with its ruler, formerly unnoticed 'spaces'

⁶¹⁴ GREWE, *supra*, at 64.

⁶¹⁵ TAYLOR, *supra*, at 157.

⁶¹⁶ This view is commonly shared by Hannis Taylor, Eric Suy and Julio Barberis, the latter explaining that '*[A]u Moyen Âge et dans les monarchies absolues, en général, le Seigneur ou le Prince disposait de son domaine comme d'un objet lui appartenant. Le territoire faisant partie de son patrimoine*'; yet, it is categorically opposed by W. Grewe who considers that the sources do not support such a concept.

⁶¹⁷ See GREWE, *supra*, at 67, who follows the explanation of Brunner who alludes to the notion of *Gewere*, described as: '*the actual holding and exercising of a power of control over the land, on which the presumption of legality of the exercise of that control was based*'.

⁶¹⁸ *Ibid.*

were apprehended to become 'territory', a notion which thereby began to play a role in the legal and political orders of the time.⁶¹⁹

The territory as an institution found in the modern State a privileged habitat, within which it was promoted to constitute not only an important circumstantial factor of the organization of power,⁶²⁰ but a truly defining feature of the State itself (both in its historical and ontological dimensions) as an entity emerged in a new and unprecedented form.⁶²¹ Even authors who consider ancient political entities as States – that is, scholars who recognize a plurality of State forms – agree that the differential characteristic of the modern State compared with its predecessors is the existence of a territorially based nation.⁶²² Most importantly, the integral character of the territory and the modern State finds full realization and embodiment in the principle of territorial sovereignty, absolute recognition of which by the 1648 Treaties of Münster and Osnabrück was, as Thomas Baty explained, the only way to escape the prospect of eternal religious war in Europe.⁶²³ As the territory became, for the modern State, the '*framework of independence and security in the political order*',⁶²⁴ the principle of territorial sovereignty is thus first and foremost meant to protect such a framework from external threats or aggression and, in doing so, to reaffirm the existence of the State independent from any other entities. M. Weber's famous definition of the State as a '*human community that (...) claims the monopoly of the legitimate use of physical force within a given territory*' is perhaps illustrative of this dimension of the territory.⁶²⁵ Yet, as the modern State comfortably settled down between the 16th and the 18th centuries, other facets of the integral bond between territory and State also arose; territorial sovereignty was not only

⁶¹⁹ See LA PRADELLE, *supra*, at 423, who recalls how the moment of acceptance of the Latin word *spatium* into the French vocabulary, during the 12th century, preceded the acceptance of the words *territorium* and *terra* in the 14th century.

⁶²⁰ *Ibid.*, at 425. [Emphasis added]. La Pradelle indeed explains: '*l'institution du territoire, promu élément d'une formation à caractère étatique, fait son apparition dans les documents écrits de l'Égypte des pharaons et dans l'Asie antérieure, en Mésopotamie, Sumer et Akkad*'. [Emphasis added].

⁶²¹ See DE VISSCHER, *supra*, at 205, who explains: '*the essential place that territory holds in the organization of the State and its highly symbolic meaning explain the propensity of authors as well as of State practice to identify the territory with the State, or at least to regard its spatial delimitation as inseparable from that of sovereignty*'.

⁶²² See for instance, TAYLOR, *supra*, at 26. See also the definition of State given by E.A. FREEMAN, *Comparative Politics*, 1896, (California: McMillan and Co. Ltd), at 83: '*a considerable and continuous part of the earth's surface inhabited by men who at once speak the same language and are united under the same government*'.

⁶²³ T. BATY, *International law*, rev. ed. 2005, (New Jersey: The Law Book Exchange Ltd.), at 244.

⁶²⁴ DE VISSCHER, *supra*, at 205.

⁶²⁵ M. WEBER, 'Politics as Vocation', in *Essays in Sociology*, (translated and edited by H.H. GERTH and C. WRIGHT MILLS, 1946, (New York: Oxford University Press). The inseparable connection between the sovereign and the territory over which he/she rules is also clearly present in Hobbes' *Leviathan*.

involved in the protection of the State's independent existence, but also played a role in asserting both the distinctive identity of the nation the State embodies and its effective power within the international society.

Though it is difficult to disentangle the historical process by which a community progressively develops an emotional bond to a specific part of the earth's surface until its identity becomes inseparably associated with that soil, the result of such a process is, in contrast, quite apparent. Within the modern European nation-State,⁶²⁶ the territory was as much the locus of the exercise of public authority as the body of the nation itself. Resulting from and being fused with the outcome of a process whereby nationhood was 'territorialized', the modern European nation-State embraced the territory as its natural substrate and vested it with a strong and irreplaceable symbolic power. Considering that '*the fabric of society is territorial*'⁶²⁷, Thomas Baty eloquently depicted this symbolic dimension when saying that '*the absolute sacredness of a nation's land is the vital nerve of our present system.*'⁶²⁸ The ontological function of the territory in defining both the spatial dimension of the newly emerged independent State entities and their identity as a distinctive political community are already strong reasons explaining the central position of the territory within the modern State. Such a prominent place continued to grow as States consolidated the cardinal role in the international society they undeniably played in modernity and still hold today.⁶²⁹ It is thus possible to consider that the '*obsession with territory*' that George Scelle denounced began particularly to occupy the minds of international scholars at the time of the exponential flowering of modernist thought (from the late 18th century to the late 19th century).⁶³⁰

It is widely known and generally considered that the main characteristic of modernity was that it brought about a new understanding of history. While Jens Bartelson considered how such new understanding was facilitated by the invention of a whole series of concepts, such as growth, evolution, development and progress, which were used to '*define time itself and create sociopolitical temporality*',⁶³¹ Chenxi Tang recalls and emphasizes the subjective historical consciousness and critical self-positioning in time which made possible the creation

⁶²⁶ See J. BARTELSON, *The Critique of the State*, 2001, (Cambridge, UK: Cambridge University Press), at 45, who defines the European Nation-State as the outcome of the '*ideally convergent concepts of nation and State sedimented into one uniform object of enquiry*'.

⁶²⁷ BATY, *supra*, at 251.

⁶²⁸ *Ibid.*, at 245.

⁶²⁹ RUIZ FABRI, *supra*, at 153: '*À la fois auteurs et sujets de droit international, les États tiennent dans la société internationale, le rôle cardinal. Plus, l'État est devenu une valeur, voire une finalité, au point qu'on a pu parler de statolâtrie (S. Rials)*'.

⁶³⁰ G. SCELLE, '*L'Obsession du territoire*', 1958, (The Hague: *Symbolae Verzijl*), at 34.

⁶³¹ BARTELSEN, *supra*.

of such concepts.⁶³² Most importantly, Tang proves that modern consciousness encompassed as much the position of human existence in time as its position in space; that modernity also had an '*intrinsic spatial dimension*' to be found in the '*geographical imagination*' of modern society.⁶³³ An important element of such imagination is the association of the territorial features of the State with its power. Although the inextricable link of these two concepts (geography and power) was known since the development of cartography well before the beginning of modernism,⁶³⁴ it was particularly enhanced during modernity as it became the object of the newly born discipline of political geography.

Born in a Prussian cradle and conceptually developed by Ratzel soon after the turn of the 20th century,⁶³⁵ the German school of political geography (also known as *Geopolitik*) was concerned with the causal relationship between the geography of a State – in particular, its position (*Lage*) and its extent (*Raum*)⁶³⁶ – and its political power in foreign relations. Social Darwinism and scientific determinism burgeoning at the time significantly influenced the approach of *Geopolitik* to the concept of territory. In the early foundational period of the discipline, the State's land, spiritually bound to the nation it embraced, was represented as a living organism destined to continue growing. Thus, the State's borders were necessarily flexible,⁶³⁷ and their evolution akin to a mirror of the State's grandeur (if the borders were extended) or of its decline (if the borders remained static). Territory thus conceived was both the full expression of the power of the State and the fundamental premise of power as such.⁶³⁸

⁶³² C. TANG, *The Geographical Imagination of Modernity*, 2008, (Stanford, Calif.: Stanford University Press), at 1.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*, at 139.

⁶³⁵ Although it is widely known and accepted that the term '*Geopolitik*' as such was coined by Swedish political scientist Rudolf Kjellén in the late 19th century.

⁶³⁶ F. RATZEL, *Der Lebensraum: Eine biogeographische Studie*, 1901, (Darmstadt, Germany: Wissenschaftliche Buchgesellschaft).

⁶³⁷ Determinism rejected by the French school of political geography, which shared ideas of flexible boundaries but considered these as the result of human behaviour. See in particular the work of Jacques ANCEL, 'Les frontières: étude de géographie politique', (1936) *Recueil des Cours de l'Académie de Droit international de La Haye*, tome 55, vol. I, pp. 203-298, at 208-210: '*Ainsi, la géographie des frontières est seulement la géographie des limites imposées à l'activité d'un groupe. Or, les groupes ne sont jamais immobiles. Elle vit avec les groupes, évolue avec eux, est fonction d'un équilibre. [L]a frontière n'est donc jamais déterminée par la nature ni par l'homme, la volonté de l'homme est l'élément déterminant. [J]'insiste sur ce point: la volonté de l'homme fixe la frontière*'. Against this view on mobility of borders, because inconsistent with the notion of State, see G. JELLINEK, *Allgemeine Staatslehre*, cited in Ancel, *supra*, at 267.

⁶³⁸ Early expression of this idea given by the Prussian military cartographer Heinrich Gottlob Hommeyer who wrote that '*the situation, current shape and external condition of the land, or the space occupied by the state on the earth's surface form the basis of state power as such*', cited in C. TANG, *supra*, at 141. Thus, while sharing a similar view on the function of territory, cartography and geopolitics differ in their view of the nature of the land as such, its ontological characteristics.

The inherent multidisciplinary nature of the geopolitical discourse attracted scholars from adjacent disciplines soon after its inception, including international law. Alexander Orakhelashvili recently recalled how the object of study of geopolitics – the interaction between the categories of power, space and right – ‘*significantly overlaps the focus of international law*’.⁶³⁹ Though geopolitical knowledge remains alive, developed and applied within and outside governmental structures⁶⁴⁰ – particularly of hegemonic or emerging countries – the interdisciplinary debate between geopolitics and international legal scholarship seems very limited. Such radical decrease can be explained by the general association of the expansionist policy of the 3rd Reich with Ratzel’s theory of vital space (*Lebensraum*), which was (mis)used by the National-Socialist government to justify the violation of bordering States’ territorial integrity.⁶⁴¹ In this context, it does not come as a surprise that scholars of the new post-war international legal order, emphatically construed around the general and principled prohibition of the use force, did not want to be influenced by nor associated in any way with German geopolitical thought. Yet, between the late 19th century and the 20th century inter-war period, the particular impact of political geography on the minds of modernist international lawyers was apparent, animating among them perhaps the most prolific debate on the meaning and legal status of territory in international law, and directly influencing some of their findings.⁶⁴²

2.1.2. *The Myriad of Pre-Charter Theories on the Legal Nature of Territory*

Put in historical perspective, the notion of territory has come to serve the modern European State through three main functions: it first provided the basis for the existence of the State as an independent entity while also representing the identity of its nation

⁶³⁹ A. ORAKHELASHVILI, ‘International Law and Geopolitics: One Object, Conflicting Legitimacies?’ (2008) *Netherlands Yearbook of International Law*, vol. 39, pp. 155-204. He also insisted that both disciplines also share a common normative methodology, since they aspire to ‘*transcend subjective perception and interest*’ and focus on what it regards as objective and natural, at 155.

⁶⁴⁰ See for instance the range of contracted reports on geopolitics and climate change contracted by the U.S. Pentagon in the context of the Climate Change and International Security Discourse, *supra*, Chapter 2, Section 2.2.1.

⁶⁴¹ On the (mis)use of geopolitical thought, see G. KEARNS, *Geopolitics and Empire*, 2009, (Oxford: Oxford University Press); M. BASSIN, ‘Race Contra Space: The Conflict Between German “Geopolitik” and National Socialism’ (1987) *Political Geography Quarterly*, vol. 6, n° 2, pp. 115-134; and O. OSTERUD, ‘The Uses and Abuses of Geopolitics’, (1988) *Journal of Peace Research*, vol. 2, p. 192.

⁶⁴² A clear illustration of such impact can be found in the words of W. SCHOENBORN: ‘*le droit international peut utiliser, au moins quant aux détails, certaines suggestions précieuses et fécondes résultant de découvertes récemment faites dans le domaine de la géographie politique*’, in W. SCHOENBORN, ‘Nature juridique du territoire’, (1929) *Recueil des Cours de l’Académie de Droit international de La Haye*, tome 30, vol. V, pp. 81-190, at 90.

(integrative function through unification and representation of a people); it delimited the boundaries of the exercise of the new form of public authority (organizational function of internal and external competences) and, finally, it played a role as both the premise and the full expression of the realization of the State's power in its foreign relations (rationalization function on the use of power). The setting of this three-dimensional functionalist approach to territory helps to explain why, by the turn of the 20th century, the inseparability of State territory (that is, territory in its physical dimension) from statehood was clearly uncontroversial.⁶⁴³ While widely accepting the existence of such a strong bond, every attempt to establish a theory on the legal nature of territory in international law has been thwarted by what it implies – namely, that no concept of territory has been able to detach its physical sense from its abstract sense.⁶⁴⁴

Perhaps triggered by the birth of geopolitics as a new school of thought centred on the concepts of space and territory, since the end of the 19th century interest in the concept of territory also reached the front line of international legal scholarship. Rather than considering the legal nature of the territory as such, the international legal theories sought to deal with the nature of State sovereignty in respect of territory.⁶⁴⁵ Modernist attempts to establish a theory of territory in international law will therefore be considered, while also assessing the effects on such attempts of the so-called 'codification of statehood' – by Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.

'Pre-codification' Approaches: Territory as Property vs. Territory as a Space of Competence

In defining the legal nature of the concept of territory and its place in the general theory of the State, European international scholars of the modernist epoch can be classified by their preference for the patrimonial theory, the constitutive theory, or the competence theory of territory.⁶⁴⁶

⁶⁴³ Franz von Listz' consideration – written in 1904 – that supremacy over territory (*Landeshoheit*) is one of the 'very indispensable attributes of the State', for instance, illustrates this point; F. VON LISTZ, *Das Völkerrecht: Systematisch Dargestellt*, 1904, (Berlin: Häring). Also, some decades later, Sir Robert Jennings would put this issue as follows: 'what is intended here is not merely territory in the physical sense but State sovereignty in respect of territory', in Sir Robert JENNINGS, *The Acquisition of Territory in International Law*, 1963, (Manchester, UK: Manchester University Press), at 2.

⁶⁴⁴ This point is particularly made by E. SUY, 'Réflexions sur la distinction entre la souveraineté et la compétence territoriale', in R. MARCIN (ed.) *Internationale Festschrift für Aldred Verdross zum 80. Geburtstag*, 1971, (Munich: Flink), at 493.

⁶⁴⁵ JENNINGS, *supra*, at 2.

⁶⁴⁶ This clear and bipartite distinction is adopted by Eric Suy. See E. SUY, 'Réflexions sur la distinction entre la souveraineté et la compétence territoriale', in *Hommage à Verdross*, *supra*, at 493. Julio

The patrimonial theory of territory, which appeared earlier in time and seems to have been predominant until the inter-war period, views the legal bond between territory and the State as a right of property. The Italian school led by Donato Donati, whose influence through his landmark work *Stato e territorio* can still be detected in the work of some contemporary Italian scholars, such as Paglieri,⁶⁴⁷ greatly defended this approach and developed its core theoretical foundations. Donati contended that the right exercised by the State in respect of its territory is '*un diritto di dominio*' perfectly compatible with the right of property held by the individual persons inhabiting the State. This view seems to be inspired by a loose analogy with the rights that the Lord or King held over his land in the seigniorial epoch of late feudalism which, as Julio Barberis explains, lasted until absolute monarchies were replaced by constitutional systems in early modern times.⁶⁴⁸ Both the roots and the lasting effect of this theory – conceiving State sovereignty in respect of territory as a private-law relationship – were undoubtedly facilitated by the significant number of concepts and terminology that international law on the acquisition (and loss) of territory had borrowed from the Roman private law tradition.⁶⁴⁹ Sir Robert Jennings for instance points out how international law requires, '*like the Roman law counterparts*', the presence of '*a corpus*', as much as of an '*animus*', for the creation and maintenance of a title of territorial sovereignty. This parallelism explains the great importance given to the possession of the land (through effective control) for the creation and maintenance of a sovereign right over it.⁶⁵⁰ Moreover, the effects of

Barberis nonetheless also distinguishes a third theory of a distinct category which conceives the territory as a space where the State exercises its *imperium*, and is led by German authors influenced by *Geopolitik*.

⁶⁴⁷ D. DONATI, *Stato e Territorio*, 1924, (Rome: Athenaeum). The patrimonial theory was followed in France by P. FAUCILLE, *Traité de droit international public*, 1922, 8^{ed.}, (Paris: Rousseau & Cnie éditeurs), vol. 1, at 450.

⁶⁴⁸ Julio Barberis explains that the patrimonial theory considered territory as the property of the Lord or King himself, as shown for instance by the many examples of marriage agreements among 16th monarchies which provoked the territorial subordination of one State to another (Austria and Hungary) or cession of lands which were integrated into the future wife's dowry. Barberis concludes that this conception (territory as the property of a private person) reflected the reality of international relations at the time of absolute monarchy, but that it disappeared as soon as the constitutional orders emerged, BARBERIS, *supra*, at 135-136.

⁶⁴⁹ H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, 1927, (London: Longman, Greens and Co.), Chapter III; and JENNINGS, *supra*, at 3. Roman institutions particularly developed and reached their clearest form when the municipal state of Rome was progressively transformed into a world empire, with subject territories outside the Italian borders, in W. SCHOENBORN, *supra*, at 94.

⁶⁵⁰ The most prominent manifestation of the importance of holding effective control over the land so as to create and defend a right overlies the concept of '*effectivities*'. Sir Robert Jennings thus explains that the '*tendency of the law has necessarily been to pay very great regard to the factual possession as creating title and excursions in the realms of an abstract title to sovereignty have been cautious and tentative.*' To sustain the view that there is widespread rejection of any idea that territorial sovereignty might be abstract, he cites Judge Max Huber in the *Island of Palmas* case, who contended that

Roman private law are not only visible in the meaning of the title to territorial sovereignty itself, but also in the modes by which such title can be acquired (by occupation, prescription, cession, accession or accretion, and conquest) or lost (by cession, operations of nature, subjugation, prescription, dereliction and 'revolt') – all eminent Roman legal institutions. However, by considering the territory as the object of a State's right of property (*dominium*), the patrimonial theory virtually denied the dimension of the State as an entity vested with *imperium*, embodying first and foremost a public authority displayed throughout the territory. Such a viewpoint can be seen as resulting from an anachronistic vision of statehood, reluctant to dissociate the personality of the State from that of the Head of State. Among the critics of this view was, for instance, John Westlake who, in 1914, upheld that '*each State has a sovereignty in and over its territory which presents some points of resemblance to property in land, but more important points of difference*', and thus chose to '*treat territorial sovereignty as distinct from property and avoid describing it as eminent domain*'.⁶⁵¹ Most of the scholarship though took a more ambiguous position and preferred maintaining to a great extent the high regard for Roman private law institutions put forward by the patrimonial theory, whilst also acknowledging the need to consider the mark of the State's *imperium*. The general result of this loose mix was a legally unsatisfactory depiction of the nature of the right of a State over its territory – or territorial sovereignty – as being '*akin to*' a private law relationship. As J. Brierly noted, this expression was '*in the absence of any better word*', '*a convenient way of contrasting the fullest rights over territory known to the law with the minor territorial rights to be later mentioned*'.⁶⁵²

The constitutive theory of territory reacted to this far-fetched consequence of the patrimonial theory – namely, the denial of the State's dimension as a public authority – and, as its name indicates, conceived the territory as a constitutive element of the State rather than as the object of a State's right. Despite the fact that this conceptual shift provided an explanation of the nature of territorial sovereignty more consistent with reality, its premises were strongly

'international law – the structure of which is not based on any super-state organization – cannot be presumed to reduce such a right as territorial sovereignty [t]o the category of an abstract right, without concrete manifestations', JENNINGS, *supra*, at 5.

⁶⁵¹ L. OPPENHEIM (ed.), *John WESTLAKE: Collected Papers on Public International Law*, 1914, (Cambridge, UK: Cambridge University Press), at 131. Likewise, almost two decades later, W. Schoenborn wrote: '*les relations juridiques du peuple de l'État avec le territoire qu'il occupe sont assurément toujours considérées comme correspondant à un 'droit réel', 'comme une espèce de propriété ou du moins comme un droit analogue à la propriété*', SCHOENBORN, *supra*, at 92. [Emphasis added]. Note that the relation is between the people and the territory, rather than the State and the territory, probably as an influence of the geopolitical concept of territory.

⁶⁵² J. BRIERLY, *The Law of Nations: an Introduction to the International Law of Peace*, 1955, 5th ed., (Oxford: Clarendon Press), at 150.

criticized. Firstly, it was pointed out that the ‘commanding power’ of the State cannot logically be exercised over the territory as such, but only over the people inhabiting it.⁶⁵³ This criticism was even acknowledged by Carl Victor Fricker – regarded by Julio Barberis as the founder and most important representative of the constitutive theory – who distinguished the notion of territory (*Gebiet*) from that of land (*Grund, Boden*) and defined the former as the space inhabited by the people over whom the State displays its power of command.⁶⁵⁴ Moreover, opponents argued that, if territory was to be considered as a constitutive element of the State, then any transformation of the territory would necessarily provoke the parallel transformation of the nature and identity of the State – a circumstance which, as Eric Suy recalls, only takes place in very rare cases of total succession.⁶⁵⁵ Though the constitutive theory proved very useful for the development of the basic tenets of *Geopolitik* and its organic conception of the State, it did not achieve widespread support in international legal scholarship.⁶⁵⁶

At the core of both the patrimonial and the constitutive theories of territory is their common struggle to establish an explanation of the role played by territory, as a physical element, within the State, as an abstract concept. The theory of competence (*Kompetenztheorie*) emerged as a reaction to this impasse and can be considered as the more ambitious intention to detach and free the legal nature of territory from its physical dimension. In seeking to establish a purely juridical concept of territory – and thereby equally ‘demystify the State by assimilating it with the legal order’⁶⁵⁷ – the competence theory operated a change of paradigm.⁶⁵⁸ Triggered by the publication in 1906 of G. Radnitzky’s article

⁶⁵³ See for instance SUY, *supra*, at 493, contending: ‘*or, il est évident qu’une telle puissance [de commandement] ne peut s’exercer que sur des personnes*’.

⁶⁵⁴ C.V. FRICKER, *Gebiet und Gebietshoheit: Mit Einem Anhang Vom Staatsgebiet*, 1901, cited in BARBERIS, *supra*, at 137.

⁶⁵⁵ Explanation is provided by E. Suy, *supra*, at 494, who cites the work of L. DUGUIT, *Traité de Droit constitutionnel*, 1921-1925, (Paris: Fontemoign et Cie.), vol. I, at 48. See also SCHOENBORN, *supra*, at 116: ‘*on ne peut pas bien se représenter que l’état puisse se séparer en principe de parties de son territoire, c’est-à-dire de parties de son essence! À moins qu’on admette une mutilation du corps de l’État analogue à l’amputation d’un membre du corps humain*’.

⁶⁵⁶ One of the rare exceptions was Georg Jellinek, who explicitly embraced it when asserting that ‘without the existence of human beings, we can’t speak of territory, but only of parts of the earth’s surface’, in *Von menschlichen Subjekten ganz losgelöst gibt es kein Gebiet, sondern nur Teile der Erdoberfläche*, *Allgemeine Staatslehre*, 1924, 3rd ed., at 174, cited in BARBERIS, *supra*, at 138. Perhaps the most explicit and lasting trace of influence in international legal scholarship of the constitutive theory is the preference of some scholars to consider the population of a State as the first element of the State, deserving consideration before the territory. Followers of this position include Scelle, Politis and Rousseau himself, see ROUSSEAU, *supra*, at 18: ‘*[L]e premier élément de l’État, comme toute société humaine, c’est la population*’.

⁶⁵⁷ SUY, *supra*, at 495.

⁶⁵⁸ *Ibid.* Suy indeed contends that: ‘*[L]es difficultés de l’établissement d’une théorie juridique du territoire en droit international proviennent du fait que l’on n’est pas en mesure de se détacher complètement*

'*Die rechtliche Natur des Staatsgebiets*',⁶⁵⁹ it was mostly developed by Hans Kelsen's specific application of his monistic doctrine of relations between national and international law, and then followed within the Austrian school by A. Verdross.⁶⁶⁰ The core contention of the theory of competence is to consider the territory as nothing but the space where a statist legal order is valid⁶⁶¹ and within which the State can exercise its coercive power.⁶⁶² Thus, whilst emphasizing the idea of competence, this theory downgrades the role of possession which is central to the patrimonial theory; nor does it accept to consider territory as a constitutive element of the State, since it presupposes the latter's existence. The competence theory has proven to be particularly useful in explaining cases in which a State, for instance, exercises its competences in a territory that does not fall under its sovereignty – that is, in identifying the need to differentiate territorial sovereignty from territorial competence. Yet, this differentiation is what permits the patrimonial and constitutive theories, on the one hand, and competence theory, on the other hand, to be regarded as being complementary rather than mutually exclusive. The patrimonial and constitutive theories deal with the creation and maintenance of the right to territorial sovereignty; they are concerned with the nature of the right over the territory and how such right is created, maintained or lost. The competence theory operates *after* the title or right to territorial sovereignty over a specific portion of the earth has been established, and instead focuses on explaining what are the consequences of the existence of a right to territorial sovereignty for the validity of the legal order of the State.

Codification of Statehood: Territory in the Montevideo Convention and Subsequent Practice

All in all, it can be considered that to a great extent the legal theories on the bond between the State and its territory seemingly reflect the differing faces of 'territorial functionalism' as revealed in the preceding brief historical account. Yet, since '*State territory is inseparable from statehood*', as Sir Robert Jennings categorically stated, every attempt to establish a legal theory of the nature of territory in international law also heavily bears the stamp of a particular conception of statehood. Noting that the development of these theories

d'une conception physique du territoire pour n'y voir qu'une notion purement juridique'. [Emphasis added].

⁶⁵⁹ G. RADNIZTSKY, 'Die rechtliche Natur des Staatsgebiets' [Juridical Nature of the State], (1906) *Archiv für öffentliches Recht* XX, 313 ff.

⁶⁶⁰ See the Commentary of B. CONFORTI, 'The Theory of Competence in Verdross', (1994) *European Journal of International Law*, vol. 5, pp. 70-77.

⁶⁶¹ H. KELSEN, *General Theory of the Law and the Law and the State*, 1945, (Cambridge, Mass.: Harvard University Press).

⁶⁶² This second two-fold meaning was added by A. Verdross.

of territory only involved European intellectual circles, which to some extent represented the views of different 'national schools' – the Italian School being the house of the patrimonial theory, the German School, that of the constitutive theory, and the Austrian School, that of the competence theory, supported or complemented by French and English legal scholarship – it does not seem far-fetched to consider that these theories inescapably carried a 'Eurocentric stamp'.

The relevance of this background arises particularly when considering the impact of Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (hereafter, the Montevideo Convention) on the range of existing understandings of the legal nature of territory in international law at the time.⁶⁶³ Establishing a definition of the entities with legal personality to which the obligations of the Convention may be applied, Article 1 provided that:

'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.'

This provision '*witnessed ample citation*' among scholarly circles as well as in international courts and tribunals and,⁶⁶⁴ in the absence of a better definition of the State – resulting, for instance, from the International Law Commission⁶⁶⁵ – found few obstacles to its being considered as the 'codification of statehood', while arguably also existing as a general rule of customary international law. This current widespread embrace of the content of Article 1 contrasts with the regional origin of the Convention, which was adopted at the Seventh International Conference of American States by only nineteen States.⁶⁶⁶ Commenting on the Montevideo Convention, T. Grant has argued that the success story of Article 1 is simply the reflection of a consensus on its content existing by the time of the Convention's adoption. Yet,

⁶⁶³ Convention on the Rights and Duties of States (Montevideo Convention), adopted on 26 December 1933, entered into force on 26 December 1934, 165 L.N.T.S. 19. Text reprinted (1974) in *American Journal of International Law*, vol. 28 (Suppl.), at 74.

⁶⁶⁴ See T. GRANT, *supra*, at 407, who considers that '*the dearth of examination surrounding elements of the Convention*' was due to the existence of '*consensus on territoriality, population and effectiveness by the eve of Montevideo*', at 418. See also J. CRAWFORD 'The Criteria for Statehood in International Law' (1976–1977) *British Yearbook of International Law*, vol. 48, at 93; and J. D. VAN DER VYVER, 'Statehood in International Law' (1991) *Emory International Law Review*, vol. 5, issue 9, at 14.

⁶⁶⁵ As pointed out by Grant, ideological divisions among UN Member States impeded the adoption by the International Law Commission of a draft definition of statehood, in GRANT, *supra*, at 408 (footnote 20).

⁶⁶⁶ Regional origin of the convention and the small number of signatories contrasts with its successful influence afterwards. The signatories were: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, United States of America, Uruguay, Venezuela.

when interpreting Article 1 as such, as well as its subsequent impact, neither the importance of the wider political context from which the Convention emerged nor the content of other provisions of the Convention can be ignored or downgraded.⁶⁶⁷

The Convention vividly reflected the main purposes of panamericanism, a movement which marked transatlantic international relations of the late 19th century and early 20th century. Finding its roots in the Monroe Doctrine and explicitly developed in an institutionalized form since 1890, this movement sought to reaffirm the independence of young American States from their former European colonial masters. This principled goal is clearly expressed in Article 3 of the Montevideo Convention, which provides that '*the political existence of the State is independent of recognition by the other States*'. Thereby, the signatory States affirmed their acceptance of the declaratory theory of recognition – as opposed to the European-led constitutive theory, which is all the more emphasized with the explanation of the consequences of recognition set up in Article 6, which reads:

*'The recognition of a state **merely signifies** that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.'*⁶⁶⁸

When providing that recognition of a political entity as a State by other States has only a declaratory effect, the Montevideo Convention conceived statehood as a matter of fact, not of law. Article 1 must be read through this prism, as establishing a set of 'criteria' – rather than elements – which can be objectively recognized and thus serve to prove the factual existence of a State, rather than to constitute the State itself.⁶⁶⁹ The result of this consideration of statehood as a matter of fact and the 'objectivization' of the criteria enunciated in Article 1, particularly those referring to a material existence, such as territory and population, was the

⁶⁶⁷ This is not an attempt to interpret the legal meaning of Article 1 of the Montevideo Convention by applying the Rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties. It is just a view that seeks to relocate the definition of the State (and the role played by the concept of territory in such definition) in a wider political framework, so as to react against what Norberto Bobbio described as the fact that '*lawyers have seized the problem of the State, and define it in this way*', (Los juristas se han adueñado del problema del Estado, y lo definen de esta forma'), in N. BOBBIO, N. MATTEUCI y G. PASQUINO (dir.), *Diccionario de Política*, 2008, (Méjico D.F.: Siglo XXI), vol. 2, pp. 1215-1225, at 1220.

⁶⁶⁸ Montevideo Convention, Article 4, *supra*. Full Article 3 of the Montevideo Convention reads: '*The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.*'

⁶⁶⁹ The term 'criteria' is borrowed from James Crawford.

correlative decline of the need to establish legal theories of the concept of territory and its functions in international law. What the territory is for a State and the legal nature of this bond is not as important as its actual existence (for the creation of the State) and possibly also of its permanence (for the continuation of the State).

2.2. The Meaning of Territory in the Creation of Post-Colonial Pacific Island States

2.2.1. Decolonization and the Creation of Pacific Island States: Limited Territoriality Justified by a New Normative Framework

As already pointed out, the legal theories of territory in international law can be said to reflect the roles and functions that the territory played in the historical process of formation of the European nation-State. The present section considers how the State-building movement resulting from 20th century decolonization and which brought about a new form of statehood, generally referred to as 'the post-colonial State', invites a correlative adaptation of the understanding of the role and place of the concept of territory. When applied to the south Pacific region, this adaptation helps to explain why the extremely limited territorial extent of small Pacific Island States did not impede their constitution as independent State entities.

The consideration of the State as a matter of fact rather than of law – resulting from the conception of recently independent American States and encapsulated in Article 1 of the Montevideo Convention – marked the prelude to the new form of the State which would fully materialize after the Second World War. The world order that emerged from the smoke and ashes was soon polarized by the division between the liberal and the communist blocs headed, respectively, by the United States of America and the Soviet Union. Nonetheless, despite their paramount confrontation, these two powers were united in their opposition to the continuation of the colonial system and thereby facilitated the incorporation of decolonization into the agenda of post-war international relations. Far from merely constituting a circumstantial political agreement, the new world order was accompanied by a radical shift in the *normative* framework concerning colonies.⁶⁷⁰ Decolonization and its product, the 'post-colonial state', thus came to embody a new form of statehood; one grounded in a specific paradigm that finds its roots in the fourteen points of Woodrow Wilson's inter-war plea on the right to self-determination.

⁶⁷⁰ See G. SORENSEN, *Changes in Statehood: the Transformation of International Relations*, 2001, (New York: Palgrave MacMillan), at 57.

Although decolonization ultimately implied the '*global imposition*' of the State as the universal form of political organization, the resulting heterogeneity of the international system cannot be overlooked.⁶⁷¹ The acknowledgment of a typology of States based on a differentiation between the modern and the post-colonial forms is drawn from M. Weber's ideal types of States. As explained by Georg Sorensen, these ideal types constitute analytical constructs or '*conceptual patterns*' that accentuate selected aspects of historical reality, rather than expressing concrete empirical findings.⁶⁷² Thus, the post-colonial ideal type not only constitutes a new 'form' of statehood, but is also a potential vehicle of a new 'understanding' of statehood, complementing and rendering more complex the previous knowledge traditionally derived from the modern type of State. One manifestation of the contribution of the post-colonial State to the understanding of statehood can be found in, for instance, the rise of 'independence' as a criterion of statehood that was not only included in the list set up in Article 1 of the Montevideo Convention but came to be considered by prominent authors, such as James Crawford, as the most important criterion of all.⁶⁷³

As the criteria of independence became the cornerstone of post-colonial State-building, other criteria listed in Article 1 of the Montevideo Convention – both material and immaterial – decreased in value. Again, G. Sorensen clearly explains the general consequence of this move when he states that '*the normative framework around decolonization gave the right of independence to ex-colonies no matter what level of actual weakness that they displayed*'.⁶⁷⁴ It is in this context that one can understand how a set of entities with such an extremely limited territorial extent as that of the small Pacific island countries could emerge in the international system in the form of independent States, to which all the attributes of statehood (formal equality, territorial integrity, right to self-defence, etc.) were granted, in spite of their questionable capacity to exercise or protect them. The predominance of the normative framework in which Pacific Island States emerged as independent entities implied that both the material and the non-material elements of the State were subject to different standards from those of the modern European States. Therefore, in the meaning of territory for these new players in the international system, States must be attached to the specific

⁶⁷¹ As G. Sorensen remarks, despite the fact that authors from the fields of international relations and of international law generally have a good consideration of decolonization as a political and historical process – dynamics – with an enormous impact on the current shape of the international system, both disciplines tend to develop their theories on the basis of the modern State.

⁶⁷² SORENSEN, *supra*, at 73.

⁶⁷³ This position is consistently defended by J. CRAWFORD in *The Creation of States in International Law*, *supra*.

⁶⁷⁴ SORENSEN, *supra*, at 83.

functionality framework of territory. In order to grasp the functionality played by the concept of territory in the South Pacific region and explain the emergence of micro-States in this area, one is again compelled to go outside the realm of law and review the historical turning points of the region.

What is today referred to as the Pacific Island States corresponds to the division of over 20,000 islands into twelve independent political entities, scattered over an immensely wide oceanic space and surrounded by disproportionately big continental territories – the South American coasts of Peru and Chile to the east, the Oceanic New Zealand and Australian territories to the south and south-west, respectively, and, moving towards the north-west, the Asian coast to the west covering the coasts of Indonesia, Philippines and Japan. In spite of their recently acquired statehood, the limited extent of the territory of these entities – coupled with the considerable distances between the islands that form such territory and their economic underdevelopment – make them a good example of ‘weak players’ produced by decolonization. Hence, these sometimes condescendingly labelled ‘micro-States’ are associated with images of remoteness, smallness, vulnerability and, more recently, with a set of actors who, despite being completely devoid of power in the international system, insist on claiming the need for international action to stop the threat that climate change impacts constitute for their survival as States.

And yet, the history of the Pacific Island States suggests exactly the opposite. Far from having been disconnected from the world’s history, this region has had close bonds with the big powers of each historical epoch ever since the 16th century. The history of this assemblage of scattered islands spread over the biggest and most unpredictable of the world’s oceans is the story of a transformation effected over five different ages or epochs, each of which has different repercussions that go far beyond their small geographical size. From being the object of the major powers’ geopolitical interests during the first ‘ages’ of discovery and colonization, or the theatre of these powers’ confrontation and their striving to establish a balance of power in the 20th century, the newly emerged Pacific Island States have become actors of the international system, themselves owners of their own geopolitical calculations and bound to face the specific post-colonial security struggles that make the region highly dependent on different forms of inter-regional and international co-operation.

The ‘age of discovery’ marked the beginning of the region’s connection with European States in the early modern period. As reported by historian Mercedes Matoro Camino, after Fernando Magallanes completed his circumnavigation between 1519 and 1521, three Spanish

expeditions, conducted by Álvaro de Mendaña de Neira and Pedro Fernández de Quirós,⁶⁷⁵ departed from the west coast of South America to the *Mares del Sur* (the South Seas) in search of a large Southern Continent referred to as *Terra Australis Incognita* or *Terra Magellanica*.⁶⁷⁶ These explorations were followed by Portuguese and Dutch excursions, which competed with potential Spanish interests, but also helped the elaboration of the first cartographic images of the south-east Pacific, thus transforming it into a geo-political space of '*geographical, economic, missionary or colonial importance*'.⁶⁷⁷ From that time to the last voyage of James Cook in the last third of the 18th century, early European fascination would progressively evolve into the mercantilist system in which the Pacific became subjected to European colonial domination.

The strength of these colonial bonds increased particularly as the Pacific territories not only constituted a source of trade but also mirrored the transforming balance of power occurring in Europe from the 18th century onwards. During the period referred to by Eric Hobsbawm as 'The Age of Empire' (1875–1914), the decay of the Spanish, Portuguese and Dutch presence in the region was replaced by the increasingly important French, British and then German naval forces.⁶⁷⁸ First, the French incursion into the Pacific began between 1840 and 1850 with the annexation of the Marquesas Islands, New Caledonia (*Nouvelle Calédonie*) and Tahiti, followed by the Loyalty Islands in 1864. The great expansion of the British Empire over the Pacific started in 1874 with the annexation, through the Treaty of Cession with King Catabau, of the roughly 300 islands of Fiji. By the time Archduke Franz Ferdinand of Austria was assassinated in Sarajevo in 1914, Britain had: established its presence in south-eastern New Guinea after a partition agreement with Germany (1884); proclaimed British Protectorate over Tokelau (1889) and the Gilbert Islands – today Kiribati – (1892); negotiated an Anglo-French Treaty of Condominium of the New Hebrides (today Vanuatu) in 1906; and put an end

⁶⁷⁵ The first expedition, led by Álvaro de Mendaña de Neira in 1567, departed from Lima (Peru) and led to the discovery of the Solomon Islands in 1567. The second expedition, also led by Mendaña de Neira, who travelled with Pedro Fernández de Quirós as a pilot, took place between 1595 and 1596. The third expedition, this time led by Pedro Fernández de Quirós, left from Lima in 1605, under the command of his wife, Admiral Isabel Barreto, and arrived at an island which they baptized Espirito Santo, (today in dispute between Vanuatu and France) which they took possession of on 14 May 1606. When leaving the island, they came back to the Philippines via the Torres Strait, between modern Papua New Guinea and Australia. See M. MAROTO CAMINO, *Producing the Pacific: Maps and Narratives of Spanish Exploration (1567-1606)*, 2005, (Amsterdam, New York: Rodopi), at 15.

⁶⁷⁶ *Ibid.*, at 69, insisting on the idea that the space is as much a social *product* as a social *producer*, and considers maps as '*tools of conquest*' that '*demonstrated the intimate relationship between spatial representation and power*'.

⁶⁷⁷ *Ibid.*, at 1.

⁶⁷⁸ E. HOBBSAWM, *The Age of Empires*, *supra*.

to the dispute with the United States on the recognition of Britain's presence in the Ellice Islands (today Tuvalu), the Solomon Islands and Tonga.⁶⁷⁹ Yet, by the last decade of the 19th century, this playground of world powers would reflect how British dominance was gradually being challenged by the rise of Germany.⁶⁸⁰ Four years after having taken control of north-east New Guinea (1884), Germany annexed Nauru (1888) and began mining the island's phosphate deposits through a consortium with the British Phosphate Commission. Germany's increasing negotiating power also led to the division of Western Samoa (today Samoa) by agreement with the United States, concluded after the previously failed attempt to reach a tripartite agreement to include Britain. In addition to this imposition of its own space among those of the other already present powers, Germany took over the very last remnants of the Spanish Empire and purchased the Marianas and Caroline Islands (today Palau) a year after Spain's symbolic loss of Cuba in the Spanish–American War (1898). It also spread its influence on the islands north of the equator by establishing the Protectorate of the Marshall Islands. Meanwhile, the United States maintained a low profile and its timid presence in the region was primarily driven by its concern for the trade route with China and Japan. Thus, right before the turn of the century, the United States acquired Hawaii and the island of Guam, the annexation of which in the same year was also an outcome of the Spanish–American War (1898). A year later, the USA also acquired American Samoa (following the 1890 three-powers Convention, although the USA only formally took power in 1926) and agreed to recognize the British presence in Tonga.

The starting point of the 'age of confrontation' – which essentially matches Eric Hobsbawm's 'short 20th century' (1914–1991) – was the outbreak of the *Grande Guerre*. Though the Pacific islands were spared direct destructive forces in World War I, the outcome of the war was nevertheless reflected once more in the region. As the German presence was completely eliminated, the decline of the British Empire in favour of rising regional powers (Australia, New Zealand and Japan) was evident. The presence of Australia, which till the war had been limited to the acquisition, by transfer, of former British New Guinea in 1902, grew since its occupation of the phosphate island of Nauru, as well as of German New Guinea, during the war. From 1919 to 1939, Nauru remained under an Australian administration exercised under a League of Nations' mandate, jointly held by Britain, Australia and New

⁶⁷⁹ Several changes in the constitutional status of the islands succeeded, leading especially to a change of their status from protectorates to colonies, as occurred for the Gilbert Islands (Kiribati) in 1915.

⁶⁸⁰ E. A. WALKER, *The Cambridge History of the British Empire*, 1963, (Cambridge, UK: Cambridge University Press).

Zealand. Likewise, New Zealand's presence in the small Pacific islands – limited until then to the transfer by Britain of the Cook Islands in 1901 – rose as it became the administering power of the former German Western Samoa in 1918 and received the administration of Tokelau from Great Britain in 1925. Yet, the deciding shift in the geo-political balance of the region in the aftermath of World War I was the rise of Japan as an important maritime power in the region, which may be said to have started since its victory in the battle of Tsuchima against the Russian Empire in 1905. Japan's growing colonial expansion towards the south Pacific led to its occupation of the islands north of the equator (the Marianas, Caroline and Marshall Islands) during World War I. It then succeeded to these former German colonies which were united and renamed the Pacific Islands Territory and which it administered – supposedly – on behalf of the League of Nations. This would nonetheless prove to be a dead letter, since the islands became key naval and air bases and were used as platforms for attacking the US naval base of Pearl Harbor on 7 December 1941. Hence, from being the playground of world powers, the Pacific islands became a battlefield of the Second World War and the place where the turning point of the strife – as well as of world history – took place. For a short period of time during the war, Japan enjoyed a dominant power position in the south Pacific, occupying Nauru, the Solomon and the Gilbert Islands and exercising direct political control of Papua New Guinea. Yet, the act of aggression of the Japanese Imperial Army against the U.S. naval base in Hawaii triggered the direct involvement of the American forces which would be determinant in the victory of the Allies, and was counterbalanced in 1943 by the major American victories against Japan in the islands of Makin and Tarawa (today part of Kiribati). After the war, the Japanese presence in the Pacific islands was almost completely eliminated. As the settlers were repatriated to Japan and the country deprived of all its overseas possessions, Japan's new constitution provided that it would renounce the use of force and would only allocate 1% of its GDP to defence spending. The United States retained the exclusive control of all the naval and air bases around Japan (including the Okinawa base) and complemented Japan's minimum self-defence arrangements by the 1951 Mutual Security Agreement. Thus, the succession to the USA of islands formerly under Japanese administration, after the end of World War II, correlatively inaugurated American dominance in the region through the establishment in 1946 of the UN Strategic Trust Territory – covering the Marianas, Caroline and Marshall Islands. Moreover, in parallel with the conclusion of the 1951 San Francisco Peace Treaty with Japan, the USA promoted the creation of ANZUS, a defence alliance with Australia and New Zealand that reaffirmed the position of these regional powers.

The American dominance of the islands through the establishment of the Pacific Trust Territory, which covered an area of over 7.5 million sq. km., became very important during this period, as it was used by the United States in the Korean and Vietnam Wars of 1954 and 1962, respectively. Once again acting as a mirror of the major States' balance of power, the region also witnessed – particularly since the 1980s – the surrounding presence of Soviet naval forces which had began an expansion towards the South Pacific. Fearing that the Pacific islands might become 'a new Cuba', the United States unsuccessfully tried to convince Japan to play a greater role in the defence of the Pacific, whilst, in parallel, seeking to reinforce the USA's nuclear presence in the area through the operation of the ANZUS agreement. Yet, the reluctance of Australia and New Zealand to let U.S. nuclear-powered ships and aircraft use their bases led to the cancellation of the 1985 defence exercise as well as the end of intelligence co-operation with New Zealand. To counterbalance this situation, the USA concluded in 1984 an agreement with Fiji allowing the deployment of nuclear-powered warships from the port of Suva, Fiji's capital.

It is of course within the Cold War context that the south-east Pacific Island States began their 'age of independence'. Although A. J. Christopher indicates that the renaming of French Settlements in the Pacific Ocean as French Polynesia in August 1957 can be considered as '*the first official hint of Pacific island ethnic nationalism*',⁶⁸¹ the files on this region were not ready to be closed before the early 1970s, with a few exceptions. Considering Pacific islands as being at '*last ripe for decolonization*', David McIntyre emphatically stated that '*in all earlier discussions about the future of smaller territories, the Pacific islands were at the bottom of the list, always in the "never" category*'.⁶⁸² The reluctance of administering and colonial forces to decolonize Pacific islands partly illustrated the Anglo-American approach to self-determination, but also stemmed from the fear of dilution of the United Nations by several territories allegedly too small to support their own statehood.⁶⁸³ Yet, the decolonization of the region was triggered in 1961 when the United Nations prompted the American government to speed up the constitutional advances in the Pacific Trust Territory. Western Samoa (1962) and Nauru (1968), both under U.S. trusteeship since World War II, were therefore the first to acquire independence in the region. They were followed by the British Protectorates of Tonga (1970) and Fiji (1971).⁶⁸⁴ Tonga, Western Samoa and Fiji were thus able to attend the first

⁶⁸¹ A. J. CHRISTOPHER, *Atlas of States: Global Change 1900–2000*, 1999 (London: John Wiley and Sons), at 180.

⁶⁸² D. W. MCINTYRE, *British Decolonization: 1946–1997*, 1998, (New York: St Martin's), at 68.

⁶⁸³ This could have had legal implications for the status of these islands, see *infra*, Section 2.2.2.

⁶⁸⁴ Within Fiji, the island of Rotuma was recognized as having a special status.

‘Commonwealth Heads of Government Meeting’, in 1971, a new-style gathering that was held for the first time outside London – in Singapore – ⁶⁸⁵ and where the Commonwealth Declaration of Principles and the Commonwealth Fund for Technical Co-operation were adopted. While, in the mid-1970s, Papua New Guinea acquired independence as a single State (1975), ⁶⁸⁶ the single British Protectorate over the Gilbert and Ellice Islands was fragmented into two new States following the 1974 referendum. On the one hand, the former Ellice Islands – with a majority Polynesian population – acquired independence as Tuvalu in 1978. It was followed a year later (1979) by Kiribati – with a majority Micronesian population – constituted by the former Gilbert, Phoenix and Line Islands, along with a special status for the phosphate island of Banaba (formerly Ocean Island). By the turn of the 1980s, the former Anglo-French condominium of the New Hebrides was dissolved and became independent as Vanuatu (1980), thus marking the only French retreat from the region. ⁶⁸⁷ Finally, the UN Pacific Trust Territory composed of the islands north of the equator was fragmented into four parts. In 1986, the Federated States of Micronesia and the Marshall Islands acquired statehood, followed by Palau which, after separating from the Federated States of Micronesia in 1978, also acquired statehood, in 1994. ⁶⁸⁸ All three chose a compact of free association with the United States as their preferred form of political organization, ⁶⁸⁹ while the Marianas Islands, Guam and Hawaii were integrated into the United States. Likewise, the Cook Islands, Niue and Tokelau were integrated into New Zealand as territories. ⁶⁹⁰

2.2.2. Micro-States in the United Nations: Limited Territoriality Superseded by Active Participation in the International Community

⁶⁸⁵ MCINTYRE, *supra*, at 68.

⁶⁸⁶ Later on, between 1988 and 1998, in Papua New Guinea the secessionist Bougainville Revolutionary Army sought independence of Bougainville Island (formerly part of the Solomon Islands) in order to control the copper mine.

⁶⁸⁷ The French resisted decolonization in the Pacific just as in the Caribbean, whereas the British assumed that the process was going to take place anyway. The island of Espiritu Santo tried to secede from Vanuatu the same year. The only major territorial dispute of the region that remains unsettled is between France and Vanuatu, and concerns some islands south of Vanuatu and north of the French territories of Wallis and Futuna.

⁶⁸⁸ The date of independence was delayed by the approval of the Compact of Free Association, which did not take place until 1993.

⁶⁸⁹ See J. CRAWFORD, *supra*, who explains that ‘[T]he classification of common forms of organization have no legal consequences beyond those arising from the specific agreement or instruments in question, this has no direct bearing on the entity’s legal status or lack of it as a state under the criteria referred to [in Article 1 of Montevideo Convention]’.

⁶⁹⁰ In 2006 and in 2007, a referendum was celebrated in Tokelau on whether to change the status of Tokelau from a territory of New Zealand to an independent State in free association with New Zealand. The results did not reach the threshold needed to approve the change of status.

This reminder of the decolonization of Pacific Island States serves the purpose of explaining how statehood could be acquired by political entities with a very small territorial extent, limited population and being economically underdeveloped. Simply put, the territorialization of nationhood in the case of this region can be said to be a function of the exercise of the right to self-determination, an expression of such right. As such, the territory conveys the necessary physical support for these colonized 'nations' or 'peoples' to achieve formal independence from western colonial control; it is at the disposal of a very specific normative framework superseding the downfalls that very small newly emerged States may endure in the effective exercise of their State competences. If the historical and political context in which the Pacific Island States emerged explains how they could acquire formal independence despite their small geographical size, it is equally important to account for the means by which they were able to survive as members of the international community. Considering how they could effectively act 'as States' is tantamount to exploring their substantial inequality and to assessing whether, after being freed from colonial rule, these peoples' self-determination attained a full level of realization.⁶⁹¹

As in the rest of the world, decolonization did not put an end to the dependence of now newly emerged Pacific Island States on their former ruling power. During the new 'age of co-operation', the former colonial dependencies remained functional under the informal control of some world powers, who maintained their presence in the region through economic and political support. The framework for institutional co-operation with former colonial powers in the region was first dominated by the acquisition, by most of the former non-self-governing territories, of membership (either full or associate) of the Commonwealth, which put dominant British presence in the region back on track.⁶⁹² This membership included States that had chosen independence as the political form of their statehood (Kiribati, Tuvalu, Solomon Islands, Fiji, Tonga, Vanuatu, Nauru, Papua New Guinea and Western Samoa), as well the self-governing entities in a compact of free association with another State (Federated

⁶⁹¹ W. HARRIS, 'Microstates in the United Nations: A Broader Purpose', (1970) *Columbia Journal of Transnational Law*, vol. 9, at 23: '[T]he effective decolonization of many small underdeveloped possessions has been a distinctive accomplishment of the past decade. Yet, little attention has been focused on their successful movement toward self-determination'.

⁶⁹² We exclude from this 'co-operation framework' the territories which were integrated into those of their former colonial rulers, such as: the French DOM-TOM, which were recognized as having a higher degree of autonomy within the centralized French State than the rest of the French '*départements*' (French Polynesia, New Caledonia, Wallis and Futuna); the American territories like Hawaii, which became the 50th American State on 21 August 1959, Guam, American Samoa; and the New Zealand territories of Cook Islands, Niue and Tokelau.

States of Micronesia, Palau, Marshall Islands, Cook Islands, Niue, Tokelau).⁶⁹³ In the case of these free-association States, irrespective of their Commonwealth membership, the compacts of free association logically created particular and additional bilateral ties. The western – particularly European – presence in the region also materialized through the creation of the South Pacific Commission. Nonetheless, by the time the UK had entered the European Union, in 1973, the South Pacific Commission was replaced by the Pacific Island States Secretariat – which then became the Pacific Islands Forum, in 2000, to which France, the UK and the USA were not invited to be members; their leadership was replaced by today's main regional powers, namely, Australia and New Zealand. Since its creation, the importance of this co-operative framework has increased so as to become a vehicle of financial development through aid flows, technical assistance and defence co-operation (including disaster-relief services) from these two countries to the Pacific Island States. More recently, the European Union's inclination to renew an active collaboration with Pacific Island States seems to be competing not only with Australia and New Zealand, but also with the rising active interest of the Chinese investment sector in creating a zone of influence in Oceania.⁶⁹⁴

The inherently weak governmental and economic structures of Pacific Island States following decolonization undeniably favoured the maintenance of an informal but critical dependence on established economic and political relations with a former colonial power.⁶⁹⁵ Therefore, qualifying for UN membership represented, for these States, unsurprisingly, the assurance that a future release from such informal control was possible and would allow them to finally achieve the right to self-determination. The United Nations was thus seen as a solid structure which could provide an alternative protection;⁶⁹⁶ a forum of dialogue between the newly emerged States and their former rulers, where the Pacific Island States could, as W. Harris puts it, '*publicize grievances and forge public support which may ultimately be the most*

⁶⁹³ While Tokelau is an integrated territory of New Zealand, Niue and the Cook Islands are self-governing territories and thus enjoy a higher level of administrative and legal autonomy with respect to New Zealand. Yet, they fall short of constituting independent States like the Marshall Islands, the Federated States of Micronesia and Palau, which are in a Compact of Free Association with the United States and yet are also members of the United Nations.

⁶⁹⁴ T. WESLEY-SMITH and E.A. PORTER (eds.), *China in Oceania: Reshaping the Pacific?*, 2010, (Oxford and New York: Bergham Books).

⁶⁹⁵ W. HARRIS, *supra*, at 38. [Emphasis added].

⁶⁹⁶ As former UN Secretary-General Dag Hammarskjöld noted, it is not the major powers, but rather '*all the others*' that need the United Nations for their protection, in Secretary-General, *Annual Report on the Work of the Organization*, 1960, 15 UN GAOR 332.

effective tactic available when a microstate cannot defend itself, or when regional assistance is not available to limit coercion'.⁶⁹⁷

Yet, the qualification of micro-States (including Pacific Island States) for UN membership was far from being easily accepted,⁶⁹⁸ particularly by the British and American representatives. While the preliminary question of how to define a 'micro-State' was not completely resolved,⁶⁹⁹ the heated debate within the UN on this issue is a vivid reminder of how smallness can be nothing but a *relative* weakness, since, in the context of institutionalized co-operation – particularly in one such as the United Nations, which is based on the principle of formal equality – the leverage of the majority can, at least in principle, supersede the control of the powerful. Thus, aware of the limited capacities of small island States, the view rapidly spread in the corridors of the UN that small could equally be 'dangerous'⁷⁰⁰ – a perception which, interpreted through Marxist lenses, corresponds to the traditional fear of 'the tyranny of the majority'. By admitting to UN membership a set of small States – including twelve Pacific Island States), large powers would account for only for one third of the total UN membership, in spite of providing 90% of the organization's budget.⁷⁰¹ In contrast, the 'newcomers' could at least hypothetically use their collective voting strength to '*influence political decisions and shape the policy in the organs of the United Nations*'.⁷⁰² Apart from the political imbalances that could result from the qualification of States for UN membership, their

⁶⁹⁷ HARRIS, *supra*, at 35.

⁶⁹⁸ 'Being a State' is not enough. The question of UN membership is not a question of recognition of micro-states' independent statehood, but on how to evaluate their participation in the international community within an institutionalized framework.

⁶⁹⁹ As difficult as it is to define a 'State', it is also difficult to define, in legal terms, what constitutes a 'micro-State'. The first definition of micro-states was given by UN Secretary-General U-Thant in the 1968 Annual Report of the Secretary-General on the Work of the Organization, which held that micro-states are '*entities which are exceptionally small in area, population and human and economic resources, and which are now emerging as independent states*.' Some authors only take into account the population size, and generally refer to States with a population below 1 million as micro-states. This is, for instance, the view taken by the UNITAR Report directed by Jacques Rapoport, which included States with small territories, like Pacific Island States, but also States with larger territories, such as Qatar. Those considering the smallness of the territory do not quantify how small is 'small' but, regardless of the unspecified threshold, all Pacific Island States undoubtedly fall into this category. See Secretary-General, *Annual Report of the Secretary-General on the Work of the Organization*, 1968, 22 UN GAOR, Supp. 1 A, document reference: A/6701/Add.1. See J. RAPOPORT et al., *Small States and Territories: Status and Problems*, (1969) UN Institute for Training and Research (UNITAR), Series n°3; and R. RAPOPORT, 'The Participation of Ministates in International Affairs', (1968) *Proceedings of the American Society of International Law*, vol. 62, pp. 155ff.

⁷⁰⁰ S. HARDEN (ed.), *Small is Dangerous: Micro-States in a Macro-World*, 1985, (London: Frances Pinter Publishers).

⁷⁰¹ Oceania would then account for 9% of total membership.

⁷⁰² W. L. HARRIS, 'Microstates in the United Nations: A Broader Purpose', (1970) *Columbia Journal of Transnational Law*, vol. 9, n° 23, pp. 23-53.

eventual repercussion on the stability of international affairs was also contemplated, fearing that the entrance of these States might provoke an excessive effect of regional issues, so that the East–West bipolar confrontation would, consequently, become multi-polar.

In contrast, other political considerations in favour of the admission of micro-States⁷⁰³ highlighted the idea that the universalization of the United Nations was a goal to be sought for the organization to enable it to transcend its original core role of maintaining international peace and security and fulfil a ‘higher’ idealist goal, that of becoming ‘*an organization in which nearly all nations can bring their influence to bear upon problems of mutual concern and in turn are influenced by the policies and needs of other States*’.⁷⁰⁴ This group of supporters relied on the normative argument in favour of the full realization of the right to self-determination and considered that denying UN membership to these newly independent States could be equated to a ‘pro-colonialist’ stand. Finally, defenders of micro-State membership of the UN argued that the context of Cold War *détente* was far more appropriate; international stability would be increased by broadening the organization’s membership, and would give ‘*more multidimensional, more pluralistic and perhaps more realistic interpretations of UN developments*’ whilst, as W. Harris explains, ‘*seen from the perspective of the arms race, the faulting of small states for their inability to carry out Charter obligations by rendering military support to the UN becomes less persuasive when the political environment produced by the thermonuclear age is considered*’.⁷⁰⁵

It is in the context of these competing political calculations that the question of whether micro-States would actually have the capacity to fulfil their membership obligations was raised. Although it may be said that this issue was raised in support of the previously mentioned political considerations opposing their entrance – and thus operates in a highly politicized context – it was a question belonging to the realm of law in so far as it called for the application of Article 4 of the United Nations Charter. This provision contains the conditions necessary to qualify for UN membership and implies that statehood is a necessary but not a sufficient condition; a candidate entity must not only ‘be a State’, but also ‘*in the judgment of the Organization, be able and willing to carry out the obligations contained on the Charter*’.⁷⁰⁶

⁷⁰³ D. ORLOW, ‘Of Nations Small: The Small State in International Law’, (1995) *Temple International and Comparative Law Journal*, vol. 9, pp. 115-140 at 119-123, who distinguishes three types of micro-States: European micro-States (San Marino, Lichtenstein), post-colonial ‘enclaves’, and international city-states (The Vatican). Pacific Island States likely fall into the second category.

⁷⁰⁴ HARRIS, *supra*, at 34.

⁷⁰⁵ *Ibid.*, at 34.

⁷⁰⁶ Article 4 of the UN Charter reads, in full: ‘1. *Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment*

The introduction of the criteria of capacity hints at the traditional weight of the criterion of effectiveness in the shaping of international rules, which had already been previously revealed in 1928 when Lichtenstein's application for membership to the League of Nations was rejected.⁷⁰⁷ It is also a view consistent with the idea that the UN system constituted a reflection of the prevalence of the so-called 'concept of large powers' in the 1948 San Francisco Conference.⁷⁰⁸

In an attempt to reconcile the core of the opposed political interests – universalization of the United Nations vis-à-vis preserving a similar allocation of voting power within the General Assembly – proposals for an alternative status to that of full membership were raised and discussed both in academic circles and within UN organs. The possibility of granting micro-States with observer status was first raised by former Secretary-General U-Thant in 1965. It is a status with no firm legal basis which rests on UN practice and does not require amendment of the Charter. Being a member of a UN organ or specialized agency and recognized as a State by a majority of UN Member States are the requirements settled by practice. Yet, observers do not have the right to oral or to written participation in the General Assembly or the Security Council and would not be able to make proposals in these organs either. The possibility of regional memberships was therefore also raised, according to which a group of States would participate and vote jointly. This proposal had the inconvenience of requiring amendment of the UN Charter and was unlikely to work well in practice, for neighbouring States often have great disparities – especially in the context of intense nationalistic feelings existing in new small States.⁷⁰⁹ Yet, the most prominent proposal that was discussed within the UN Security Council was that of creating a form of associate membership. A year after UNITAR conducted its report, written by Jacques Rapoport, on the issues of micro-States, the U.S. delegate to the Security Council proposed to grant micro-States an associate member status that would give

of the Organization, are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.' Besides, criteria for UN membership were developed in UNGA Res. 1514/XV, 'Declaration on the Granting of Independence to Colonial Countries and Peoples', adopted on 14 December 1960, 947th plenary meeting, document reference: A/RES/1514 (XV), as well as by the ICJ advisory opinion on Conditions of Admission of a State to Membership in the UN, 1948, 57 and 'Competence of the General Assembly for the Admission of a State' (Advisory Opinion, 1950) ICJ Reports 4.

⁷⁰⁷ Before 1960, Luxembourg and Iceland were the only UN member micro-states.

⁷⁰⁸ The idea lying behind the concept of large powers is that international peace and security can best be conducted and maintained with an international community composed of big States, because these are more stable than small States – particularly in the aftermath of World War II and at a time when institutional co-operation was not yet so much developed.

⁷⁰⁹ Other proposals included the so-called 'Fisher proposal', consisting of a weighted vote and technical and information assistance provided by the permanent secretariat, in WARRIS, *supra*, at 48.

them the right to attend a meeting of 'special interest' to the micro-State in question, and eventually the right to actively participate – with no right to vote – in meetings in which the micro-State's interests were directly involved.⁷¹⁰ This solution was presented as a '*possibility commensurate with its [the micro-states] capabilities*' that, in the eyes of the U.S. delegation, had the advantage of not requiring amendment of the Charter, for the General Assembly could create a new category and define the duties, privileges, and benefits of it.⁷¹¹ As a result of the American proposal, a 'Mini-State Committee' was established to report back to the Security Council, in time for this organ to make recommendations to the General Assembly during its 24th session.⁷¹² The expert committee on the matter resumed eight times in closed meetings, surrounded by the general feeling that the USA was trying to force the situation and rush the matter, and opposition from other newly independent States which defended the view that imposing new criteria for admission was an attack. It was then, within the Committee, that the British delegation proposed an alternative form of associate membership, though this solution did not achieve agreement in the interim report of the Committee that was sent to the Security Council. Finally, both the USA and the UK proposals would be dismissed because, apart from the outstanding issue of the definition of a micro-State pointed out earlier by J. Rapoport, the UN legal department considered that a Charter amendment would in either of the two cases be required. As a result, in a last attempt to control the entrance of micro-States, the USA sought to reactivate the role of the Admissions Committee as soon as the application of Fiji was filed, in 1970. Although the USA achieved its purpose, the resurrection of the Admission Committee, in practice, made no difference to the case of Fiji, nor that of the other micro-State applications that followed; the Admission Committee would simply convene for a few minutes and recommend the admission unanimously.

The genealogy of the territory concept briefly presented above has revealed how the evolving meaning of the concept reflects the range of functions it has historically been called upon to play, and how such roles have been tackled from three main different legal standpoints. This historical and functionalist approach unveils the double condition of territory as being both a physical reality and a legal construct, two dimensions that are essential to the *creation of States* and which find in State theory a common ground. The three legal theories of territory have also demonstrated that, when assessing 'the role' or 'the meaning' of territory in

⁷¹⁰ UNSC, Verbatim Record, S/PV.1505 (1969); and UNSC, Verbatim Record, S/PV.L1506 (1969).

⁷¹¹ These competences derive from Articles 10 and 11 of the UN Charter, together with Article 21 of the General Assembly Rules of Procedure.

⁷¹² M. M. GUNTER, 'The Problem of Mini-state Membership in the UN System: Recent Attempts Toward a Solution', (1973) *Columbia Journal of Transnational Law*, vol. 12, at 470-472.

international rules governing statehood, one ultimately needs to question the nature of the relationship between these two dimensions.

Assessing the effects of transformation or loss of territory of *an existing State entity* – a process referred to hereafter as ‘de-territorialization’⁷¹³ – correlatively implies the existence of the same double-edged meaning of the term ‘territory’. Hence, de-territorialization is to be understood as a bipartite process involving: (1) the set of physical changes in the territory of a State; and (2) the transformation of the territorial rights of the State as a result of such physical changes. It is equally a process that can be divided into two main scenarios corresponding to different stages of development and increased gravity. Scenario 1 (developed in Section 3 below) deals with limited or partial de-territorialization of a State, as currently observed in several Pacific island countries, and involves cases of acute coastal erosion, whereby the coastal geography of *some* particularly vulnerable features of an island State – in particular coral reefs and atolls – is transformed. This invites exploring not only the physical manifestations of climate change impacts on the land occupied by a State, but also the legal effects of these changes on the maritime spaces corresponding to such land and which are also an integral part of a State’s spatial dimension.

Scenario 2 (developed in Section 4 below) contemplates the possibility of total loss of territory, as may be *projected* for at least the three Pacific Island States that are entirely low-lying land: Tuvalu, Kiribati and the Marshall Islands.⁷¹⁴ This – for now – hypothetical case raises the question of whether a completely de-territorialized State can or should survive as a sovereign independent entity, and calls for an exploration of the devices that would become necessary to ensure the continuation of statehood: from physical re-territorialization strategies, such as cession by or purchase of land of another State, to a legal fiction creating a *sui generis* sovereign entity through recognition of an ‘*ex situ* nationhood’.

⁷¹³ The basic meaning of the Latin prefix ‘de-’ is: ‘away’, ‘off’; it generally indicates reversal or removal in English.

⁷¹⁴ Outside the Pacific Ocean, the fourth most endangered State in the world is the Maldives. In the south-east Pacific, Tokelau could also be included in this study, but since it is a New Zealand territory, its continuation as a State is not really at stake. This situation is to be distinguished from that of the Marshall Islands, which are in a free association with the United States and yet, as clarified by Crawford, the political organization of an entity does not alter its condition as a state. All other Pacific Island States are a mix of different types of features, and generally count with coral atolls, high coral islands, continental islands and volcanic or high volcanic islands. Therefore, while as a whole the region is undoubtedly vulnerable and directly exposed to various manifestations of the adverse impacts of climate change, the concrete effect of such impacts on the topographical features of an island State is subject to important variations.

3. SCENARIO 1. PARTIAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: JEOPARDIZING THE MARITIME SPACES OF THE STATE

3.1. Effects of Coastal Geographical Changes on Maritime Rights

Since the early stages of climate change regime-building, small island developing States have been undeniably confronted with the darkest face of the phenomenon. While today the Climate Change and International Security Discourse is perhaps a striking reminder of this image, the vulnerability of small island developing States – generally defined as the propensity or predisposition to be negatively affected by climate change impacts – was never disregarded within mainstream international co-operation on this issue.⁷¹⁵ Integrative approaches to evaluating the ‘vulnerability profile’ of a region or country take into account a range of factors in which the biophysical attributes of the area studied, its socio-economic and even its cultural characteristics are taken into- consideration. Climate change effects can thus be measured across different thematic areas, including for instance health impacts (disasters due to climate-sensitive diseases), economic stress (tourism, industry and asset losses), weather disasters (deaths and damage caused by storms, floods and wildfires), and habitat loss (population at risk due to desertification and sea-level rise).⁷¹⁶ Within the latter thematic area and despite difficulties in creating clear climate modelling scenarios, it is possible to assert that the spatial dimension of small island developing States is particularly vulnerable to three specific types of climate change effects: sea-level rise, ocean acidification and the increase in ocean temperature. Thereby, the coasts of these States are where de-territorialization is essentially located.

The progressively increasing coastal erosion and land loss as a consequence of sea-level rise has long been on the international agenda. It dates back to the campaign launched by the Maldives which sought to raise awareness of this issue at the 1984 Commonwealth Ministerial Meeting which, as recalled in paragraph 13 of the UNFCCC Preamble, was followed by the successful introduction of the item into the work of the General Assembly.⁷¹⁷ As already

⁷¹⁵ IPCC, *Managing the Risks of Extreme Events and Disasters to Advanced Climate Change Adaptation*, C. B. Field, V. Barros, T. F. Stocker, D. Qin, D. J. Dokken, K. L. Ebi, M. D. Mastrandrea, K. J. Mach, G.-K. Plattner, S. K. Allen, M. Tignor, P. M. Midgley (eds.), 2012, (Cambridge, UK and New York: Cambridge University Press), at 4.

⁷¹⁶ This is the division followed by the Climate Vulnerability Monitor: *The State of the Climate Crisis, 2010 Report of the Climate Vulnerability Initiative*, 2012, (Madrid: DARA).

⁷¹⁷ Paragraph 13 of the UNFCCC Preamble reads: *Recalling also the provisions of General Assembly Resolution 44/206 of 22 December 1989 on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas and the pertinent provisions of General Assembly*

acknowledged in 1997 by the IPCC in its Report entitled 'Regional Impacts of Climate Change: An Assessment of their Vulnerability', sea-level rise is '*the most significant climate-related projection for small islands*'. At the time of publication of the report, the projected estimate of future global sea-level rise was 5mm/yr (with a range of 2–9mm/yr); that is, '*2 to 4 times higher than what had been experienced globally over the past 100 years*'.⁷¹⁸ While the report recognized that the level of vulnerability would vary from island to island, it considered that '*practically all small island States would be adversely affected by sea-level rise*'. In the south Pacific region, the twelve independent small island States are indeed of different nature and composition and, while most of them are coral islands, there are also several continental, old volcanic and high volcanic features in the Pacific region.

Climate change impacts are particularly harmful for the coastal geography of features based on coral skeletons. First of all, low-lying coral atolls with an altitude of less than 5 metres are undoubtedly the most directly exposed to sea-level rise – inundations and sea flooding having already been projected in 1997 for the Marshall Islands and Kiribati.⁷¹⁹ Secondly, coral atolls below 5m altitude and raised coral islands with an average altitude of 60m, along with the coral reefs surrounding them, are extremely vulnerable to progressive bleaching primarily due to increased ocean temperature and ocean acidification by carbon dioxide.⁷²⁰ Recent studies have categorized South-East Asia as the region with both the highest level of biodiversity and the greatest degree of threat to reefs (followed by the Caribbean),⁷²¹ since in

Resolution 44/172 of 19 December 1989 on the implementation of the Plan of Action to Combat Desertification.

⁷¹⁸ IPCC, IPCC, *Regional Impacts of Climate Change: an Assessment of their Vulnerability*, R. T. WATSON, M. C. ZINYOWERA, R. H. MOSS (eds.), 1997, (Cambridge, UK: Cambridge University Press), chapter 9.

⁷¹⁹ *Ibid.*

⁷²⁰ According to the Global Island Database, islands host 65% of the world's coral reefs and include 14 of the 20 largest coral-reef countries. The livelihoods of islanders are inextricably linked to coral reefs, as they provide a source of food, protection from natural hazards, and a significant attraction for tourists. The increase in the atmospheric carbon concentration and in the sea-surface temperature fosters coral bleaching. A compilation of the global distribution of reefs can be found in UNEP-World Conservation Monitoring Centre (WCMC), *Global Distribution of Coral Reefs - Extracted from Version 7.0 of the Global 1km Raster Dataset Compiled by the UNEP-World Conservation Monitoring Centre*, 2002, (Cambridge, UK: ReefBase). Detailed information on the location and degree of bleaching can be found in the database Information on Global Coral Bleaching, ReefBase Project, WorldFish Center. This dataset is built upon an existing bleaching database developed at UNEP-WCMC, and has been maintained and regularly updated by ReefBase since 2002 from a variety of sources. The data indicate the severity of bleaching, categorized as low (1–10% corals bleached), medium (10–30% of corals bleached), or high (>30% of corals bleached).

⁷²¹ L. BURKE et al., *Reefs at Risk in Southeast Asia (RRSEA)*, 2002 (Washington D.C.: World Resources Institute). Reefs at Risk in Southeast Asia followed up the 1998 Global Reefs at Risk project conducted by the same institution. The current 2002 RRSEA analysis was implemented with more than 20 partner institutions in the region and provided a more detailed study, incorporating new features such as natural vulnerability, management effectiveness of protected areas and economic evaluation. In 2004, a

many parts of the tropics species of corals live near their temperature tolerance limits (25°–29°C).⁷²²

The socio-economic and ecological impacts of the *physical loss of land* due to coastal erosion of these features are undisputable. Yet, in this scenario, when approaching the legal consequences of coastal geographical transformation, the focus shifts towards Pacific Island States' *rights over maritime spaces*.⁷²³ In a partial de-territorialization scenario, an assessment of how the spatial dimension of Pacific Island States is affected by the adverse impacts of climate change therefore implies studying how the transformation of the coastal geography of several coral features may jeopardize these States' present rights over valuable ocean space. In making such an assessment, the following points consider the implication of climate change impacts for the law of baselines by which the outer boundary of Pacific Island States in oceanic zones is determined, by distinguishing delimited from undelimited maritime boundaries.

3.1.1. Coastal Geographical Transformation and Undelimited Maritime Boundaries

Maritime Extent of Pacific Island States and the Law of Baselines

In contrast to the extreme smallness of their terrestrial space, Pacific Island States soon benefited from the 'expansionist' evolution in the distribution of ownership and jurisdiction over maritime spaces initiated after World War II and eventually crystallized by the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁷²⁴ The consolidation, at the Third International Conference on the Law of the Sea (1973–1982), of the width of the territorial sea up to 12 nautical miles offshore and, most importantly, the possibility for coastal States to expand their jurisdiction and exploit the resources of the newly created Exclusive Economic Zones (EEZ) virtually compensated the land limitations of Pacific Island States' with disproportionately immense maritime spaces. Other than signifying an objectively added value to their spatial dimension and despite the fact that their capacity to effectively exploit and

similar study on the state on the reefs in the Caribbean basin was conducted, see L. BURKE and J. MAIDENS, *Reefs at Risk in the Caribbean*, 2004, (Washington DC: World Resources Institute). With regard to coral bleaching, the UNEP–WCMC maintains and regularly updates a database.

⁷²² IPCC, *Regional Impacts Report*, *supra*. See also, UNEP–WCMC 2008. *Annual Sea-Surface Temperature 2003–2007 (derived from the NASA 'OceanColor' database)*, Monitoring Centre, Cambridge, UK.

⁷²³ Territorial changes are not at all unfamiliar to international law, including the notion of accretion or transformation caused by nature.

⁷²⁴ United Nations Convention on the Law of the Sea (UNCLOS), adopted in Vienna (Austria) on 10 December 1982; entered into force on 16 November 1994, 1833 U.N.T.S. 3. Although it entered into force only in 1994, many rules contained in the Convention were considered as already existing under customary international law.

control these big spaces is sometimes limited,⁷²⁵ this maritime extension provided for a source of income and livelihoods that would prove significantly important for the economic development and habitability of these States. Therefore, any effects of adverse climate change impacts on Pacific Island States' maritime spaces should be considered both from the standpoint of territorial rights and from the perspective of the economic viability of the State.⁷²⁶

As the earlier 'cannon-shot rule' vanished and the width of maritime spaces became fixed on the basis of geographical criteria,⁷²⁷ the use of traced baselines longing the coasts, and from which the outer boundaries of all maritime zones are measured, was established. UNCLOS provides that the normal baseline is the '*low-water line along the coast*'⁷²⁸, though in the case of very irregular coasts, States can trace straight baselines.⁷²⁹ Special rules also govern the tracing of baselines for reefs⁷³⁰ as well as for island States eligible to claim archipelagic status.⁷³¹ After tracing the baseline in accordance with the rule corresponding to the configuration of the coast, coastal States may claim from that line an extension of their sovereignty over the adjacent ocean waters up to 12 nautical miles of territorial sea. They can also claim jurisdiction and right of exclusive exploitation of the living resources and subsoil resources up to 24 nautical miles of contiguous zone and to 200 nautical miles of exclusive economic zone. This boundary also serves to delimit the outer boundary of the continental shelf, which in some cases may be extended to 350 nautical miles. Given the extraordinary extension of coastal States' rights over the adjacent waters and the correlative reduction of

⁷²⁵ Apart from some Pacific Island States which have coastguards, most of them do not have military forces of their own and depend on the services provided primarily by Australia and New Zealand. Yet, this low capacity to defend their territory (both land and maritime) does not constitute a valid objection to their EEZ claims, as was clearly stated in the proceedings of the Third Law of the Sea Conference.

⁷²⁶ As will be pointed out later, the economic dimension connected with the maritime spatial dimension of these States is one of the most important bridges with Chapter 5 on the effects of climate change impacts on the populations of these States.

⁷²⁷ David Caron recalls that the cannon-shot rule '*carried within itself the outer boundary of the maritime spaces – at the time the only territorial sea – possibly claimed by a coastal state*'. The transition to geographical criteria seemingly resulted from the will to provide fishermen with more security, so that they could calculate their precise location at sea and to determine whether they were entering sovereign waters of a coastal State or not. David D. CARON, 'Climate Change, Sea-Level Rise and the Coming Uncertainty in Oceanic Boundaries: a Proposal to Avoid Conflict', in Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Publications on Ocean Development, vol. 65, 2009, (Leiden-Boston: Martinus Nijhoff), chapter 1, at 1.

⁷²⁸ UNCLOS, Article 5 – normal baselines.

⁷²⁹ UNCLOS, Article 7 – straight baselines.

⁷³⁰ UNCLOS, Article 6 – reefs.

⁷³¹ UNCLOS, Articles 46–47– archipelagic States. In the case of archipelagic States, the special right to claim archipelagic status from the commission and the right to provide for co-ordinates of archipelagic lines.

high-seas zones, the EEZs of neighbouring States are likely to overlap. In the case of undelimited maritime boundaries, the outer boundaries of these zones are in principle defined by a unilateral claim of the coastal State which is generally embodied in national legislation. When outer boundaries claimed by two neighbouring States overlap and no maritime delimitation agreement has been concluded, the boundary between the maritime spaces of both States will be the equidistant (for opposing coasts) or median line (for adjacent coasts).

Table 1 includes all the political entities composing the Pacific region. This includes twelve independent island States (Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) as well as the former colonial powers or trustees which have maintained their presence through incorporated territories which, in some cases, enjoy a certain degree of administrative autonomy – namely, Tokelau and Niue (New Zealand); the Marianas Islands, Guam and American Samoa (United States); the Hunter and Pitcairn Islands (United Kingdom); and New Caledonia along with French Polynesia (France). Table 1 shows that eight out of twelve independent Pacific Island States have claimed archipelagic status in their national legislations, though this position has not always been accompanied or followed by the drawing of archipelagic baselines. Thus, while Fiji, Papua New Guinea, the Solomon Islands and Vanuatu incorporated the co-ordinates of their archipelagic lines as soon as their maritime-zones legislation was enacted, and Palau included in its Constitution the direction of its archipelagic lines by specifying the names of the features involved, the most underdeveloped States of the region – namely, the Federated States of Micronesia, the Marshall Islands, Kiribati and Tuvalu – until very recently lacked the economic resources necessary to conduct scientific surveys and draw official charts.⁷³²

As will be developed below, the latter are also precisely (and unsurprisingly) the States directly affected by sea-level rise, for they are mostly (as the Federated States of Micronesia) or entirely (as Tuvalu, Kiribati, Marshall Islands) built on low-lying coral atolls. Apart from the legal insecurity arising out of the lack of official charts or co-ordinates of the location of the archipelagic baselines of these four coral-island States, the tracing of baselines in the region is also problematical because of the presence of important coral reefs in the region. This situation has, for instance, been explicitly covered by maritime-zone legislation of the two New Zealand territories: Tokelau's legislation specifies that its baseline is the low-water line along

⁷³²The effects of the lack of specification of the position of the archipelagic lines on the right to claim archipelagic status are still unclear. Apparently, it does not affect the right in itself, but can cause trouble proving an offence or violation of the sovereign waters.

the edge of the reef and the straight line joining the points where the reef is broken, whereas that of Niue provides that British Admiralty Charts should be used to draw the low-water lines and coral-reef lines. All in all, the general rule of the low-water line is not often applied in this region.

Notwithstanding the complexities of drawing baselines in Pacific Island States, all these political entities have claimed in their national legislation the maximum breadth permitted by customary international law and by treaty law, since the entry into force of UNCLOS in 2004, of the territorial sea and the exclusive economic zone.⁷³³ Moreover, the four coral-island States already mentioned have not made any claims on the exploitation of the subsoil resources of the continental shelf, since the geophysical characteristics of their territory – atolls based on coral reefs – results in very narrow continental margins.⁷³⁴ Finally, only five Pacific Island States explicitly claim fishery rights in the 24 nautical miles of the contiguous zone (Marshall Islands, Nauru, Samoa, Tuvalu and Vanuatu), presumably because it was considered that the rights granted in the contiguous zone were subsumed in the breadth of their respective EEZs.

⁷³³ See Table 1 below for list of all national claims to maritime zones and continental shelf.

⁷³⁴ The zone generally overlies very deep sea, hence there is no use of shelf resources, and more importantly of living resources (fisheries in particular). The lack of interest shown by the four Pacific Island States in their distance-based rights over continental shelf contrasts with the position of Papua New Guinea, and with Palau's new claim to an extended continental shelf. Yet, recent studies are finding magnesium beds in the EEZs of Kiribati and Tuvalu, making their rights over continental shelf more useful than was previously thought.

Table 1. Unilateral Claims to Maritime Zones and Continental Shelf in the Pacific Region

| Name of State | National Legislation | Territorial Sea | Contiguous Zone | Exclusive Economic Zone | Continental Shelf | Archipelagic Status |
|---|--|-----------------|-----------------|-------------------------|--|---|
| Cook Islands | Territorial Sea and Exclusive Economic Zone Act nº 16/1977 | 12n.m. | Not specified | 200n.m. | 200n.m. Regulated by Continental Shelf Act 1964 | NO |
| Federated States of Micronesia | Territory, Economic Zones and Port Entry, FSM Consolidated Legislation Title 18/Chap.1 | 12n.m. | Not specified | 200n.m. | Not specified | YES Claimed but not drawn Article 1 Federal Constitution refers to the 'Districts of the Micronesian Archipelago' |
| Fiji | Marine Spaces Act [CAP 158A], Act nº18/1977, Amended by nº15/1978 | 12n.m. | Not specified | 200n.m. | 200n.m. Regulated in Continental Shelf Act [CAP 149], nº 9/1970 | YES Claimed and drawn in schedule (Co-ordinates) 2 Archipelagos: Fiji and Rotuma |
| France (New Caledonia and French Polynesia, Hunter and Wallis Islands) | Information not available | | | | | |
| Kiribati | Marine Zones (Declaration) Act 1983 | 12n.m. | Not specified | 200n.m. | Not specified | YES Claimed but not drawn |
| Marshall Islands | Marine Zones (Declaration) Act 1984 [33MIRC Chap.1] | 12n.m. | 24n.m. | 200n.m. | Not specified | YES Claimed but not drawn |
| Nauru | Sea Boundaries Act 1997 | 12n.m. | 24n.m. | 200n.m. | 200n.m. | NO |
| Niue(New Zealand) | Territorial Sea and Exclusive Economic Zone Act nº220/1996 | 12n.m. | Not specified | 200n.m. | Not specified | NO Charts for low-water lines and coral reefs from British Admiralty Chart |
| Tokelau (New Zealand) | Territorial Sea and Exclusive Economic Zone Act 1977 | 12n.m. | Not specified | 200n.m. | 200n.m. | NO Baseline is low-water line along the edge of the reef and straight line joining the points where the reef is broken |
| Palau | Constitution of the Republic of Palau 1979, Article 1, as amended on 15th July 2005 | 12n.m. | Not specified | 200n.m. | Over 200n.m. 2005 Constitutional Amendment 2007 and ICCS Claim of Extended CS | YES Claimed and drawn in 2005 Amendment (Name of Features) |

| | | | | | | |
|---|--|--------|---------------|---------|---|--|
| Papua New Guinea | National Seas Act 1997 | 12n.m. | Not specified | 200n.m. | 200n.m. Regulated in Continental Shelf (Living Resources) Act, Chap 210 of Consolidated Legislation; and by the 1998 Oil and Gas Act | YES Claimed and drawn in Act (Co-ordinates) 3 Archipelagos: Principal, Tauu and Nukumanu |
| Samoa | Maritime Zones Act nº18/1999; Amendment Act nº13/2004 | 12n.m. | 24n.m. | 200n.m. | Not specified | NO |
| Solomon Islands | Delimitation of Marine Waters Act, Chap 95 of Consolidated Legislation; Declaration of Archipelagic Lines 1979 | 12n.m. | Not specified | 200n.m. | 200n.m. Regulated in the Continental Shelf Act, Chap 94 of the Consolidated Legislation | YES Claimed and drawn in Declaration (Co-ordinates) |
| Tonga | Territorial Sea and Exclusive Economic Zone Act nº30 1978 | 12n.m. | Not specified | 200n.m. | 200nm Mentioned in Amended 1979 Schedule | NO |
| Tuvalu | Marine Zones (Declaration) Act 1983 [CAP24A of Consolidated Legislation] | 12n.m. | 24n.m. | 200n.m. | Not specified | YES Claimed but not drawn Only declaration on internal waters |
| Pitcairn, Wallis and Futuna Islands (UK) | Pitcairn Islands | | | | | |
| Northern Marianas, Guam, American Samoa (USA) | Presidential Proclamation 8030, 10 th March 1983 | 12n.m. | 24n.m. | 200n.m. | | NO |
| Vanuatu | Maritime Zones Act (nº6/2010) | 12n.m. | 24n.m. | 200n.m. | 200nm or outer edge of continental margin | YES Claimed and drawn in Schedule (Co-ordinates) |

Source: Personal Elaboration from Data Found in the Pacific Islands States Legal Institute

NOTE: All national legislations referred to in Table 1 are listed below in the Bibliography and can be directly accessed through their corresponding electronic links.

On the basis of the available information and of James Crawford's study of the region,⁷³⁵ it is possible to list the thirty-two maritime boundaries overlapping in the Pacific region and which have not been the object of any delimitation agreement *yet in force*. From the twelve independent Pacific Island States, and due to the immense area of their maritime zones,⁷³⁶ Kiribati leads the list as the State with the highest number of neighbouring States with overlapping outer EEZ boundaries. Its ten undelimited borders are (North-West to South-West): Kiribati/Marshall Islands; Kiribati/United Kingdom (Baker and Howland Islands); Kiribati/United States (Jarvis Island); Kiribati/United States (Palmyra Atoll and Kingman Reef); Kiribati/France (French Polynesia); Kiribati/New Zealand (Tokelau); Kiribati/Cook Islands; Kiribati/New Zealand (Niue); Kiribati/Tuvalu; and Kiribati/Nauru. It is followed by the Federated States of Micronesia (FSM), another very extensive low-lying island State, whose overlapping EEZ boundaries are: FSM/Marshall Islands; FSM/United States (Guam); and FSM/Papua New Guinea. Fiji and the Marshall Islands also count with four overlapping and undelimited EEZ boundaries. On the one hand, there are Fiji/Tonga; Fiji/France (New Caledonia); Fiji/Tuvalu; and Fiji/France (Wallis and Futuna); on the other hand, there are the Marshall Islands/Federated States of Micronesia; Marshall Islands/Kiribati; Marshall Islands/Nauru; and Marshall Islands/United States (Wake Island). Likewise, the Solomon Islands have four EEZ boundaries: Solomon Islands/Vanuatu; Solomon Islands/France (New Caledonia); Solomon Islands/Papua New Guinea; and Solomon Islands/Australia. These are followed by Tuvalu, which has three EEZ boundaries: Tuvalu/Kiribati; Tuvalu/Fiji; and Tuvalu/France (Wallis and Futuna). Likewise, the three EEZ boundaries generated by The Cook Islands are: Cook Islands/Kiribati; Cook Islands/New Zealand (Niue); and Cook Islands/New Zealand (Tokelau). Vanuatu's EEZ boundaries are Vanuatu/France (French Caledonia); and Vanuatu/Solomon Islands. Tonga's two boundaries are: Tonga/Fiji and Tonga/American Samoa. Samoa has two boundaries: Samoa/American Samoa; and Samoa/New Zealand (Tokelau); Nauru also has two boundaries: Nauru/Marshall Islands and Nauru/Kiribati. Finally, the richest State of the region, Papua New Guinea, has only two undelimited boundaries: Papua New Guinea/Federated States of Micronesia and Papua New Guinea/Solomon

⁷³⁵ J. CRAWFORD and D. R. ROTHWELL (eds.), *The Law of the Sea in the Asian Pacific Region: Developments and Prospects*, 1995, (Dordrecht, Boston, London: Martinus Nijhoff Publishers), Publications on Ocean Development volume nº21. This work will be used as a complement to the present analysis, particularly for the identification of the names of features involved in the tracing of the equidistant or median lines of the undelimited maritime boundaries of the region.

⁷³⁶ Kiribati's expands over 700 km² and is the only State in the world which is part of the four hemispheres at the same time.

Islands.⁷³⁷ However, the regional powers also have some undelimited maritime boundaries: Australia/New Zealand; New Zealand (Niue)/United States (American Samoa).

In order to consider the how the adverse effects of climate change (particularly sea-level rise and coastal erosion) are likely to affect these thirty-two undelimited maritime boundaries in the Pacific region, it is essential to identify the features involved in the tracing of the equidistant or median delimitation lines. These correspond to the base points used for drawing the relevant baselines of each State. Thus, while acknowledging the difficulty of the task (due primarily to the lack of official charts indicating the direction of the archipelagic lines and the presence of coral reefs and indented coasts), Table 2 introduces a more concrete illustration of the effects of climate change on the maritime spatial dimension and extent of Pacific Island States, before embarking on a legal analysis of the data.

Table 2 has been assembled on the basis of James Crawford's indications; he enumerated the features involved in the delimitation of these boundaries. A search on the geophysical characteristics of these features (including their maximum altitude) has then been incorporated by using the Global Island Database of the United Nations Environment Programme, so as to differentiate five different categories of features. This geophysical information serves two purposes. On the one hand, each category has been associated with a vulnerability factor marked from 1 to 5 (1 being the level of lowest vulnerability, and 5, of the highest). On the other hand, the nature and geological composition of these features will be important in the legal analysis developed below in order to determine their corresponding legal regimes. Finally, the Table indicates which undelimited maritime boundary is likely to be affected by sea-level rise and coastal erosion.

⁷³⁷ As will be developed below, the reason given to explain the reduced number of undelimited boundaries of Papua New Guinea is that they have been subject to treaty delimitation.

Table 2. Sea-Level Rise and Undelimited Maritime Boundaries of the Pacific Region

| Name of Feature | Country | Geomorphology (max. altitude) | Degree of vulnerability (1-5) | Potentially Affected Boundary |
|----------------------|--------------------------------|---------------------------------------|-------------------------------|--|
| Abaiang | Kiribati | Coral Atoll (<5m) | 5 | Kiribati/Marshall Is. |
| Ahe | French Polynesia | Coral Atoll (<5m) | 5 | French Polynesia/Kiribati |
| Aneityum | New Caledonia (France) | Volcanic Island (852m) | 1 | New Caledonia/Vanuatu |
| Arorae | Kiribati | Coral Atoll(<5m) | 5 | Kiribati/Tuvalu |
| Astrolabe | New Caledonia (France)/Vanuatu | Reef | 5 | New Cal/Vanuatu |
| Ata | Tonga | Volcanic Island | 1 | Tonga/Fiji |
| Atafu | Tokelau (NZ) | Coral Atoll (4m) | 5 | Tokelau (NZ)/Kiribati; Tokelau (NZ)/Samoa; Tokelau (NZ)/(France) |
| Baker | USA territory | Coral Atoll, Guano (8m) | 5 | Baker and Howland Islands (USA)/Kiribati |
| Banaba | Kiribati | Raised Coral (Phosphate) Island (81m) | 3 | Kiribati/Marshall Islands.; Kiribati/Nauru |
| Beautemps-Beauprès | Vanuatu/New Caledonia (France) | Oceanic Bank/Atoll (1-3m) | 5 | New Caledonia/Vanuatu |
| Bellinghausen | French Polynesia (France) | Coral Atoll (5m) | 5 | French Polynesia/Kiribati |
| Bougainville | Papua New Guinea | High Volcanic Island (2792m) | 1 | Papua New Guinea/Solomon Islands |
| Bukatatanoa | Fiji | Barrier Reef | 5 | Fiji/Tonga |
| Butaritari | Kiribati | Coral Atoll (1m) | 5 | Kiribati/Marshall Islands |
| Cakau-Levu | Fiji | Coral Reef | 5 | Fiji/Tonga |
| Canton | USA territory/Kiribati | Coral Atoll (5m) | 5 | Kiribati/Baker and Howland Islands (USA) |
| Caroline | Kiribati | Coral Atoll (5m) | 5 | Kiribati/French Polynesia |
| Ceva-i-ra | Fiji | Coral Atoll (<5m) | 5 | Fiji/New Caledonia |
| Ebon | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Is./Kiribati; Marshall Is./Nauru; Marshall Is./FSM |
| Efate (Vate) | New Caledonia (France)/Vanuatu | Volcanic/Raised Coral (647m) | 2 | New Caledonia/Vanuatu |
| Eromanga (Erromango) | New Caledonia (France)/Vanuatu | Volcanic/Raised Coral Island (886m) | 2 | New Caledonia/Vanuatu |
| Espiritu Santo | New Caledonia (France)/Vanuatu | Volcanic/Raised Coral Island (1879m) | 2 | New Caledonia/Vanuatu; Vanuatu/Solomon Islands |
| Fakaofu | Tokelau (New Zealand) | Coral Atoll (4m) | 5 | Tokelau (NZ)/Cook Islands; Tokelau (NZ)/Kiribati |
| Fanning (Tabuaeran) | Kiribati | Coral Atoll (4m) | 5 | Kiribati/Jarvis Island (USA) |

A.TORRES CAMPRUBI
Phd Thesis_ Tesis doctoral_ Feb 2014

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|--------------------------|--------------------------------------|---|---|---|
| Fataka (Mitre) | Solomon Islands | Volcanic Island (122m) | 2 | Solomon Islands/Vanuatu |
| Flint | Kiribati | Coral Island (8m) | 4 | Kiribati/French Polynesia |
| Fonulalei | Tonga | Volcanic Island | 1 | Tonga/Fiji |
| Futuna | French territory | High Volcanic Island (765m) | 1 | Wallis and Futuna (France)/Tuvalu |
| Gardner (Nikumaroro) | Kiribati | Coral Atoll (<5m) | 5 | Kiribati/Baker and Howland Islands; Kiribati/Tokelau (NZ) |
| Guam | USA territory | Coral Atoll (<5m) | 5 | Guam (USA)/FSM |
| Hiu | Vanuatu | Raised Coral Island (366m) | 3 | Vanuatu/Solomon Islands |
| Hull (Orona) | Kiribati | Coral Atoll (9m) | 5 | Kiribati/Tokelau (NZ) |
| Hunga Ha'apai | Tonga | Volcanic Island | 1 | Tonga/Fiji |
| Hunter (Fearn; Umaenaeg) | French territory/Vanuatu | Volcanic Island (260m) | 1 | New Caledonia/Fiji |
| Huon | Vanuatu | Continental Island (332m) | 1 | New Caledonia/Vanuatu |
| Indispensable | Solomon Islands | Reef – Low-tide elevation | 5 | Solomon Islands/Australia |
| Jaluit | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/Kiribati |
| Jarvis | USA territory | Coral Island (8m) | 4 | Jarvis Island (USA)/Kiribati |
| Kapingamarangi | Federated States of Micronesia (FSM) | Coral Atoll (<5m) | 5 | FSM/Papua New Guinea |
| Kings (Three Kings) | New Zealand territory | (280m) | 2 | New Zealand/Australia |
| Kingman | USA territory | Reef | 5 | Palmyra Atoll and Kingman Reef (USA)/Kiribati |
| Kiritimati-E | Kiribati | Coral Atoll (5m) | 5 | Kiribati/Jarvis Island (USA) |
| Knox | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/Kiribati |
| Kosrae | FSM | High Volcanic Island (628m) | 1 | FSM/Marshall Islands |
| Late | Tonga | High Volcanic Island (519m) | 1 | Tonga/Fiji |
| Lifou | Vanuatu/New Caledonia (France) | Raised Coral Island (85m) | 4 | New Caledonia/Vanuatu |
| Maewo | Vanuatu | Volcanic and Raised Coral Island (811m) | 2 | Vanuatu/Solomon Islands |
| Mahur | Papua New Guinea (PNG) | Continental and Raised Coral Island (67m) | 2 | Papua New Guinea/FSM |
| Makin | Kiribati | Coral Atoll (<5m) | 5 | Kiribati/Marshall Islands |
| Malden | Kiribati | Coral Island (8m) | 4 | Kiribati/Jarvis Island (US) |
| Malekula | New Caledonia | Volcanic and Raised Coral Island (879m) | 1 | New Caledonia/Vanuatu |

A.TORRES CAMPRUBI
Phd Thesis_ Tesis doctoral_ Feb 2014

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|----------------------|--------------------------------|---|---|--|
| | (France)/Vanuatu | | | |
| Mare | Vanuatu/New Caledonia (France) | Raised Coral and Volcanic Island (129m) | 2 | New Caledonia/Vanuatu |
| Matahiva | French Polynesia (France) | Coral Atoll (<5m) | 5 | French Polynesia/Kiribati |
| McKean | USA territory/Kiribati | Coral Island (5m) | 4 | Baker and Howland Islands/Kiribati |
| Mellish | Australia | Reef | 5 | Australia/Solomon Islands |
| Mera Lava | Vanuatu | Volcanic Cone (1017m) | 1 | Vanuatu/Solomon Islands |
| Mili | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/Kiribati |
| Mokil | FSM | Coral Atoll (<5m) | 5 | FSM/Marshall Islands |
| Mota Lava | Vanuatu | Volcanic Island/Steep Cliffs (411m) | 1 | Vanuatu/Solomon Islands |
| Namorik | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/FSM |
| Namumea | Tuvalu | Coral Atoll (<5m) | 5 | Tuvalu/Kiribati |
| Nauru | Nauru | Raised Coral Island (70m) | 3 | Nauru/Marshall Islands; Nauru/Kiribati |
| Nendo | Solomon Islands | Volcanic Island (549m) | 1 | Solomon Islands/Vanuatu |
| Niguria | Papua New Guinea | Coral Atoll (<5m) | 5 | Papua New Guinea/FSM |
| Niutao | Tuvalu | Coral Island (<5m) | 4 | Tuvalu/Kiribati |
| Niuafo'ou | Tonga | Volcanic Crater (205m) | 1 | Tonga/Fiji |
| Niutoputapu | Tonga | Volcanic Island (146m) | 1 | Tonga/American Samoa |
| Niue | New Zealand territory | Raised Coral Island (73m) | 3 | Niue/Cook Islands |
| Niulakita (Nurakita) | Tuvalu | Coral Island (<5m) | 5 | Tuvalu/Wallis and Futuna (France); Tuvalu/Fiji |
| Norfolk | Australia | Old Volcanic and Limestone (318m) | 1 | Australia/New Zealand |
| North Minerva | Tonga/Fiji | Reef | 5 | Tonga/Fiji |
| Nugarba | Papua New Guinea | Rock | 2 | Papua New Guinea/FSM |
| Nui | Tuvalu | Coral Atoll (<5m) | 5 | Tuvalu/Fiji |
| Nuku Cikobia | Fiji | | | Fiji/Tonga |
| Nukufetau | Tuvalu | Coral Atoll (<5m) | 5 | Tuvalu/Fiji |
| Nukulaelae | Tuvalu | Coral Atoll (<5m) | 5 | Tuvalu/Wallis and Futuna (France) |
| Nukunono | Tokelau (New Zealand) | Coral Atoll (4m) | 5 | Tokelau (NZ)/Samoa |
| Ofu | American Samoa (USA) | Volcanic Island (494m) | 1 | American Samoa/Samoa |

A.TORRES CAMPRUBI
Phd Thesis_ Tesis doctoral_ Feb 2014

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|--------------------------|--------------------------------|----------------------------------|---|--|
| Ono-i-lau | Fiji | Volcanic/Low Coral Island (113m) | 2 | Fiji/Tonga |
| Ouvea | Vanuatu | Raised Coral Island (39m) | 3 | New Caledonia/Vanuatu |
| Pakin | FSM | Coral Atoll (<5m) | 5 | FSM/Marshall Islands |
| Palmerston | Cook Islands | Coral Atoll (<5m) | 5 | Cook Islands/Niue |
| Palmyra | USA territory | Coral Atoll (6m) | 5 | Palmyra Atoll and Kingman Reef (USA)/Kiribati |
| Penrhyn | Cook Islands | Coral Atoll (<5m) | 5 | Cook Islands/Kiribati |
| Petrie | New Caledonia (France) | Reef | 5 | New Caledonia/Vanuatu |
| Phillip | Australia | Volcanic Island (280m) | 1 | Australia/New Zealand |
| Pingelap | FSM | Coral Atoll (<5m) | 5 | FSM/Marshall Islands |
| Pocklington | Papua New Guinea | Reef | 5 | Papua New Guinea/Solomon Islands |
| Pohnpei | FSM | Volcanic Island (791m) | 1 | FSM/Marshall Islands |
| Rangiroa | French Polynesia | Coral Atoll (<5m) | 5 | French Polynesia/Kiribati |
| Reid | Fiji | Reef | 1 | Fiji/Tonga |
| Rennell (Mu Nggava) | Solomon Islands | Raised Coral Island (154m) | 3 | Solomon Islands/Vanuatu |
| Rotuma | Fiji | Volcanic Island (256m) | 1 | Fiji/Tuvalu |
| Santa Catalina (Owakiri) | Solomon Islands | Coral Atoll (<5m) | 5 | Solomon Islands/Vanuatu |
| Savaii | Samoa | High Volcanic Island (1858m) | 1 | Samoa/American Samoa; Samoa/Tokelau (NZ) |
| Shortland | Solomon Islands | Volcanic and Raised Coral Island | 5 | Solomon Islands/Papua New Guinea |
| Simberi | Papua New Guinea | Volcanic Island (?) | 1 | Papua New Guinea/FSM |
| South Indispensable | Solomon Islands | Reef | 5 | Solomon Islands/Australia; Solomon Islands/Vanuatu |
| South Minerva | Tonga/Fiji | Reef | 5 | Tonga/Fiji |
| Starbuck | Kiribati | Coral Island (5m) | 5 | Kiribati/Cook Islands |
| Swains | American Samoa (USA) | Coral Atoll (6m) | 5 | American Samoa/Samoa |
| Sydney | Kiribati | Coral Island (6m) | 5 | Kiribati/Tokelau (NZ) |
| Tabiteuea | Kiribati | Coral Islet (<5m) | 5 | Kiribati/Tuvalu |
| Tafahi | Tonga | Volcanic Island (519m) | 1 | Tonga/American Samoa |
| Tamana | Kiribati | Coral Island (<5m) | 5 | Kiribati/Tuvalu |
| Tanna | New Caledonia (France)/Vanuatu | Volcanic/Raised Coral (1084m) | 1 | New Caledonia/Vanuatu |

A.TORRES CAMPRUBI
Phd Thesis_ Tesis doctoral_ Feb 2014

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|----------------------|------------------------|-------------------------------------|---|---|
| Taongi | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/USA territory |
| Tench | Papua New Guinea | Coral Atoll (<5m) | 5 | Papua New Guinea/FSM |
| Tiga (Toga corr) | Vanuatu | Raised Coral (240m) | 3 | Vanuatu/New Caledonia |
| Tikehau | French Polynesia | Coral Atoll (<5m) | 5 | French Polynesia/Kiribati |
| Tikopia | Solomon Islands | Volcanic Islet (397m) | 1 | Solomon Islands/Vanuatu |
| Tofua | Tonga | High Volcanic Island (505m) | 1 | Tonga/Fiji |
| Tongatapu | Tonga | Raised Coral Island (82m) | 3 | Tonga/Fiji |
| Tupai | French Polynesia | Coral Atoll (<5m) | 5 | French Polynesia/Kiribati |
| Tutuila | American Samoa (USA) | High Volcanic Island (653m) | 1 | American Samoa/Tonga; American Samoa/Samoa |
| Tuvana-i-colo | Fiji | Coral Atoll (<5m) | 5 | Fiji/Tonga |
| Tuvana-i-ra | Fiji | Coral Atoll (<5m) | 5 | Fiji/Tonga |
| Ujae | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/FSM |
| Ujelang | Marshall Islands | Coral Atoll (<5m) | 5 | Marshall Islands/FSM |
| Upolu | Samoa | High Volcanic Island (1143m) | 1 | Samoa/American Samoa |
| Utupua | Solomon Islands | Volcanic/Raised Coral Island (380m) | 2 | Solomon Islands/Vanuatu |
| Vanikoro (Vanikolo) | Solomon Islands | Recent Volcano (924m) | 1 | Solomon Islands/Vanuatu |
| Vanuabalavu | Fiji | Raised Coral/Volcanic Island (283m) | 2 | Fiji/Tonga |
| Vat Ganai | Vanuatu | Rock (64m) | 1 | Vanuatu/Solomon Islands |
| Vostok | Kiribati | Coral Island (5m) | 5 | Kiribati/Cook Islands |
| Vuata Vatoa | Fiji | Reef | 5 | Fiji/Tonga |
| Wake | USA territory | Coral Atoll (6m) | 5 | USA territory/Marshall Islands |
| Wallis | French territory | High Volcanic Island (765m) | 1 | Wallis (France)/Tokelau (NZ); Tuvalu/Wallis and Futuna (France) |
| Walpole | New Caledonia (France) | Raised Coral Island (100m) | 3 | New Caledonia/Vanuatu |
| Washington (Teraina) | Kiribati | Coral Island (5m) | 5 | Kiribati/Jarvis Island (US) |

Source: Personal Elaboration from Data Found in the United Nations Environment Programme Global Island Database

Legal Effects of Sea-Level Rise on the Pacific Island States' Baselines

As one of the pioneer scholars showing concern about the effects of sea-level rise on maritime boundaries, David Caron pointed out that *'the crucial point to recognize is that [t]he law of baselines authorizes, quite intentionally, the most insubstantial, sometimes ephemeral and transient, geographic features to serve as anchors for baselines thus maximizing for each coastal state the reach of their oceanic zones into the ocean'*.⁷³⁸ Table 2 perfectly illustrates the extent of this fundamental characteristic of the law of baselines,⁷³⁹ for around 53% of the features involved in the equidistant lines of undelimited maritime boundaries in the Pacific region could be significantly affected by a sea-level rise of 1 metre. These have been marked in Table 2 as level 5 of vulnerability and correspond to 60 coral atolls or islets (maximum altitude of 5 metres) and coral islands (maximum altitude of 8 metres) as well as 10 coral reefs –that is, 70 extremely vulnerable features out of the 130 features listed in the Table. When non-volcanic raised coral islands are added to this list (6 features marked as level 4 vulnerability), the proportion of affected features is 58%.

All in all, thirty-two undelimited maritime boundaries in the region are potentially affected by the transformation (or even total disappearance) of these geographical features.⁷⁴⁰ The effects of sea-level rise and coastal erosion on the boundaries are a reflection of their effects on the baselines in which these features are involved. Therefore, the de-territorialization of Pacific Island States' maritime spaces raises two legal questions: (1) how does the physical transformation of the features change their legal characterization and modify the corresponding regime (e.g. their capacity to generate maritime spaces)?; and (2) do these changes in the legal nature and regime of these features *necessarily* generate the recession of

⁷³⁸ D. CARON, *supra*, at 5.

⁷³⁹ See J. M. VAN DYKE and R. A. BROOKS, 'Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources', (1983) *Ocean Development and International Law Journal*, vol. 12, n° 3-4, pp. 265-300.

⁷⁴⁰ Unsurprisingly, and from the data in Table 2, the boundaries most affected are those of Kiribati: Kiribati/Marshall Islands; Kiribati/French Polynesia; Kiribati/Tuvalu; Kiribati/Tokelau (New Zealand); Kiribati/Baker and Howland Islands (USA); Kiribati/Jarvis Island (USA); Kiribati/Palmyra Atoll and Kingman Reef (USA); Kiribati/Nauru; Kiribati/Cook Islands; followed by that of Wallis and Futuna (France)/Tokelau (New Zealand); New Caledonia (France)/Vanuatu; Marshall Islands/Nauru; Marshall Islands/FSM; Marshall Islands/ U.S. territory; FSM/Guam (USA); FSM/Palau; FSM/PNG; Cook Islands/Tokelau; Cook Islands/Niue (New Zealand); Fiji/Tonga; Fiji/New Caledonia (France); Tuvalu/Wallis and Futuna (France); Tuvalu/Fiji; Samoa/Tokelau (New Zealand); Samoa/American Samoa.

the baselines? In other words, may the features' capacity to generate maritime spaces be limited by a fundamental characteristic of the law of baselines?

Effect nº 1: Change of Legal Category of Features and Their Corresponding Legal Regime

During the Third Conference on the Law of the Sea, two types of competing interests clearly crystallized. The will of many States (including Pacific Island States) of using the presence of islands in their territories to secure an advantage and generate extensive maritime claims collided with reactions seeking to limit claims based on remote topographical features that would significantly diminish the extent of international seas and seabed available for navigation and exploitation by all as a 'common heritage of mankind'. As recalled and narrated by J. Van Dyke and R. Rooks, discussions among States over the legal definition of the term 'island' and the amount of maritime space attached to it can be traced back to the 1930 League of Nations Codification Conference held at The Hague, when the diplomatic debate centred on how to find criteria that could limit the effects of islands in cases where delimitations obstructed by their presence impeded reaching an equitable result.⁷⁴¹

Since the consolidation of the EEZ implies that one single island could generate 431,014 sq. km of associated maritime space, the tension between these two standpoints resulted in active and long negotiations on this matter. Yet, J. Van Dyke also points out that the drafting of Article 121 of the Law of the Sea was achieved soon after the opening of the Conference and was never amended afterwards. This provision, comprising three paragraphs, establishes a complex and controversial classification of two types of features, each able to generate maritime rights of a different nature and scope.⁷⁴² Paragraph 1 of Article 121 provides a legal definition of island as '*a naturally formed area of land, surrounded by water, which is above water at high tide*'; paragraph 2 specifies the regime applicable to legal islands and lists the maritime rights generated by them; and paragraph 3 establishes an exception to this general rule for features falling into a second category, namely '*rocks which cannot sustain human habitation or economic life of their own*'. The differences arising out of the classification of a feature in one of the two categories are significant: while features under Article 121(1) give full effect to the territorial sea, the contiguous zone, the exclusive economic

⁷⁴¹ VAN DYKE and ROOKS, *supra*.

⁷⁴² J. J. CHARNEY and L. M. ALEXANDER (eds.), *International Maritime Boundaries*, 1993, (Dordrecht: Martinus Nijhoff),

zone and the continental shelf, the exceptions considered under of Article 121(3) can only generate territorial sea. Furthermore, bearing in mind the nature of the adverse effects of climate change on the region, the intent of Article 121 should be complemented by Article 13 which defines low-tide elevations as '*a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide*' and which do not generate any sort of maritime rights. A wide range of scholarly and diplomatic interpretations has arisen, since the adoption of the Convention, on various aspects of this triple classification of features and is to be kept in mind when considering how the physical effects of sea-level rise could transform a feature originally falling under the definition of 'island' into either a rock or a low-lying elevation.

The definition of 'island' provided in Article 121(1) is perhaps the least contentious of the three types of features. It is generally accepted that features must fulfil two conditions to be considered an island in the legal sense. In conformity with Article 60(8), which provides that artificial islands do not generate territorial sea of their own,⁷⁴³ legal islands must first of all be *naturally formed*. Nonetheless, State practice seems to indicate that artificial means may be used to maintain the legal status of a feature by protecting it from severe erosion and sea-level rise, as has been done by Japan with Okinotorishima Island.⁷⁴⁴

Secondly, features must be '*above water at high tide*,' though it has been considered that exceptional episodes of sea flooding do not preclude a feature from being classified as an island.⁷⁴⁵ This criterion is what distinguishes islands from low-tide elevations – features '*submerged at high tide*' – and becomes all the more crucial in the Pacific region now that

⁷⁴³ Artificial islands generally take the form of platforms, some of which have been built up to claim the creation of a new State, the most notorious examples probably being that of the Principality of Sealand (located off the coast of the United Kingdom in the North Sea, and based in a former Second World War sea fort), and the Republic of Rose Island (located off the coast of Italy in the Adriatic Sea, and based on an artificial man-made platform). See T. SALSAS, T. BOURTZIS and G. RHODOTHEATOS, 'Artificial Islands and Structures as a Means of Safeguarding State Sovereignty against Sea-Level Rise: a Law of the Sea Perspective', in *Proceedings of the 6th ABLOS Conference "Contentious Issues in UNCLOS - Surely Not?"*, celebrated at the International Hydrographic Bureau, Monaco, in January 2010; as well as N. PAPADAKIS, *The International Legal Regime of Artificial Islands*, 1977, (Leiden: Nijhoff).

⁷⁴⁴ See, for instance, A. SILVERSTEIN, 'Okinotorishima: Artificial Preservation of a Speck of Sovereignty', (1990) *Brooklyn Journal of International Law*, vol. 16, issue 2, pp. 409-432; and G. XUE, 'How Much Can a Rock Get? A Reflection on the Okinotorishima Rock', in M. NORQUIST (ed.), *Law of the Sea Convention: US Accession and Globalization*, 2012, (Charlottesville, Va.: Center for Oceans Law and Policy), pp. 341-388.

⁷⁴⁵ Preparatory documents for the deliberations of the 1958 Convention on the Territorial Sea and Contiguous Zone contained a definition which included the phrase '*which in normal circumstances is permanently above high water*'. This conflicting wording led the USA to call for the inclusion of a reference to seasonal tidal action as well as tidal action that was subnormal or abnormal. Article 5 of UNCLOS finally and consistently states that the '*normal baseline is the low-water line along the coast as marked on large scale charts officially recognized by the coastal state*'.

episodes of sea flooding by the so-called 'king tide' are gradually becoming more frequent and harmful, to the extent that, in some cases, forced population displacement is fostered.⁷⁴⁶ Islands which have become low-lying elevations would thus lose all their maritime zones (though those located within the 12 nautical miles of the main or remaining islands may still be used as base points).⁷⁴⁷

The observed displacement movements resulting from the increased frequency of king tides and other phenomena has also pushed several authors to consider that legal islands may turn into the category of '*rocks which cannot sustain human habitation or economic life of their own*' described in Article 121(3), a highly controversial provision which has generated many divergent interpretations. Yet, a closer look into the meaning and scope of this Article reveals that the applicability of this provision for severely eroded legal islands could be disregarded on several procedural and substantive grounds. First of all, bearing in mind that the purpose of this exception to the general regime of islands was to limit potentially inequitable delimitations resulting from claims over remote features,⁷⁴⁸ Article 121(3) is arguably only applicable to features relevant for unilateral claims or bilateral delimitation purposes which are not close to a main or indisputable island.

Secondly, given that Article 121 does not take preference over the law of baselines, these features can be protected from the applicability of Article 121(3) in cases when the State has drawn archipelagic or straight lines in accordance with Article 47 and Article 7, respectively. Some authors, such as Jonathan Charney, even consider that the 'freezing' effect on the legal classification of these features could be defended by States which have claimed archipelagic status but have not yet drawn their archipelagic baselines.⁷⁴⁹ Such interpretation would thus protect features which are part of Fiji, Palau and Papua New Guinea (which have specified in their national legislation either the names or the co-ordinates of their archipelagic baselines),⁷⁵⁰ but also of the mostly affected low-lying coral island States of Kiribati, Tuvalu, the Marshall Islands and the Federated States of Micronesia (which have claimed archipelagic status but have not drawn their archipelagic baselines).

⁷⁴⁶ Although no universally accepted vertical tidal datum is in use.

⁷⁴⁷ UNCLOS, Article 13.

⁷⁴⁸ A. G. O. ELFERINK, 'Clarifying Article 121(3) of the Law of the Sea Convention: the Limits set by the Nature of the International Legal Process', (1998) *Boundary and Security Bulletin*, vol. 6, issue 2, pp. 58-68, who indicates that islands which might qualify as a rock can be included in a system of baselines and as such be used to establish the outer limits of maritime zones.

⁷⁴⁹ J. I. CHARNEY, 'Rocks that Cannot Sustain Human Habitation', (1999) *American Journal of International Law*, vol. 93, n° 4, pp. 863-878.

⁷⁵⁰ See Table 1 above.

Moreover, if these two procedural arguments were contested, it would still be possible to defend on substantive grounds – related to the interpretation of the meaning of the term ‘*rock that cannot sustain human habitation*’ – that the applicability of Article 121(3) on transformed legal islands would in any case be reserved for very exceptional cases. The grounds of this advocacy are not to be found in case law, but rather in different doctrinal positions as well as in concurrent State practice. The first interpretative strategic position to be held regards the definition of the term ‘rock’. Much controversy has arisen over whether it refers to the geo-morphological characteristics of the feature concerned and should therefore be defined in scientific terms as a hard mass of the solid part of the earth’s crust; or whether the term results from a test of the socio-economic viability of the feature and should, in contrast, be defined in cultural–geographical terms as a ‘*feature capable of supporting the stable community who use the ocean space surrounding it*’.⁷⁵¹ The position on this preliminary point is essential, for it determines the order of the methodological steps to be followed subsequently.⁷⁵² Authors such as Robert Kolb have argued in favour of a wide interpretation and consider that the use of the term ‘rock’ simply resulted from the will to emphasize the distinction from the types of features falling under paragraph 1 of Article 121, but did not foresee any need to restrict its application on the basis of the geological composition of the features.⁷⁵³ B. Kwiatkowska and A. Soons have followed a similar line and consider that the essential element of the definition is not the term ‘rock’ – which can be replaced by island or islet – but the fact that the features concerned ‘*cannot sustain human habitation or economic life of their own*’. In contrast, other scholars, such as J. Charney, upholding the narrower interpretation of Article 121(3), have argued that the purpose of UNCLOS was to distinguish different types of features according to their size. Thus, as Charney explains, ‘*originally islets and small islands used to define the features that would fall within the provision that ultimately became Article 121(3) and yet, the ultimate redaction of Art. 121(3) seems to apply to an even*

⁷⁵¹ B. KWIATKOWSKA and A. H. A. SOONS, ‘Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own’, (1990) *Netherlands Yearbook of International Law*, vol. 21, pp. 139-181, at 153.

⁷⁵² When the geo-morphological interpretation is adopted, two questions arise: (1) is it a rock or an island?; and (2) if it is a rock, can it sustain human habitation or economic life of its own? Adopting the geographical–cultural interpretation implies raising one single question: can the feature sustain human habitation or economic life of its own (for, if it cannot, it is a ‘rock’ in the sense of Article 121(3)).

⁷⁵³ R. KOLB, ‘L’interprétation de l’article 121, paragraphe 3, de la Convention de Montego Bay sur le droit de la mer: les “rochers” qui ne se prêtent pas à l’habitation humaine ou à une vie économique propre’, (1994) *Annuaire Français de Droit International*, vol. XL, pp. 876-909. Kolb upholds this interpretation after a close examination of the ‘*travaux préparatoires*’ of UNCLOS, and considers that the wording of Article 121 originated from the Turkish and Romanian proposals.

narrower range of small features than these: only "rocks".' All in all, no uniform rule seems to be available for these features wherever they are encountered. Thus, in the absence of a clear-cut understanding of the meaning and scope of Article 121(3), States affected by it could defend the preservation of their maritime claims by upholding the narrower interpretation of the term 'rock' – either considering that it refers to the geological composition or, as proposed by Charney, to the most insignificant features.

It is only when this interpretation of the meaning and scope of the term 'rock' fails to allow suspension of the application of Article 121(3) that an important legal island of the affected State – particularly in the Pacific region – may risk being re-classified as a '*rock which cannot sustain human habitation or economic life of its own*'. The test of the socio-economic viability of the feature concerned is problematic because of its two ambivalent characteristics. Despite the fact that its purpose is to measure the *capacity* of the feature to sustain human population or economic life autonomously, rather than its actual condition (namely, whether or not it is inhabitable instead of being inhabited), its inter-temporal scope⁷⁵⁴ implies that even when the feature's past capacity can be evidenced, present claims must prove that such capacity continues to exist.⁷⁵⁵ This may be an obstacle difficult to overcome in most features of Pacific Island States, which, for the vast majority, have always been uninhabited and, amongst those which have been inhabited, current displacement of human populations does not provide particularly favourable evidence of the present continuation of the features' capacity to sustain human habitation or economic life of their own. In a last attempt to avoid the inter-temporal application of Article 121(3), one could again have recourse to the second procedural argument mentioned above and consider, as pointed out by J. Charney, that the stability of a feature's legal classification was frozen at a certain date corresponding to the drawing of the archipelagic lines. Yet, it is uncertain and quite doubtful that this claim may serve to preclude the inter-temporal application of the capacity test in cases where archipelagic status has been claimed but the archipelagic lines have not been drawn.⁷⁵⁶ In these cases, as well as in

⁷⁵⁴ On the intertemporality of application of Article 121(3), see J. CHARNEY, 'Rocks that Cannot Sustain Human Habitation), *supra*, who contemplated the possibility that the capacity of a rock to sustain human habitation and economic life of its own might change over time and therefore so might their legal status (ex. Guano islands): '*[C]onsequently, the application of Art. 121(3) to a feature may vary over time, just as an ambulatory baseline might move in response to geographical changes*'.

⁷⁵⁵ KIATKOWSKA and SOONS, *supra*, at 162.

⁷⁵⁶ Thus, the use of archipelagic status could be made in two different sets of circumstances: before the application of Article 121 at all (as a preliminary exception to the *lex specialis* principle), and later, if Article 121 was applied, as a counter-argument leaving without effect or protecting against the effects of the application of inter-temporal application of Article 121(3). The difference is that as a preliminary

situations of features pertaining to States which have not even claimed archipelagic status at all, the inter-temporal application of Article 121(3) would most likely generate a reclassification of the feature concerned and consequent redrawing of the baselines to which such a feature was anchored.

Effect nº 2: Recession of Baselines and Retreat of the Affected Boundaries

As David Caron explains, once the anchor of the baseline is either submerged or susceptible of being reclassified as a rock or as a low-tide elevation beyond 12 nautical miles, the baseline is to be redrawn on the basis of the still valid base points, which in turn implies that the outer maritime boundary generated by the previous baseline is also accordingly modified.⁷⁵⁷ Alexander Soons indicates that the distance over which the baseline shifts landwards '*depends on the gradient of the land surface in the area involved: the lesser the gradient, the greater the distance*'. Thereby, he concludes that in some areas a rise of the sea level by half a metre can provoke a shift in the baseline of ten kilometres.⁷⁵⁸ It is generally explained that this chain of changes is due to the fact that '*both the baseline and the boundary generated by that baseline are ambulatory*'.⁷⁵⁹

This characteristic seems *prima facie* consistent with and resulting from the subsidiary and derived nature of maritime rights which, as Prosper Weil recalls, '*have no independent existence, but are an extension of the pre-existing territorial sea*'.⁷⁶⁰ This fundamental premise, stressed on many occasions by the International Court of Justice, implies that maritime delimitations are in most cases primarily driven by the configuration of the coast. It is equally applicable to undelimited boundaries based on unilateral maritime claims for – as explained by A. Soons on the basis of Articles 7 and 47 – '*the drawing of straight or archipelagic baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be closely linked to the land domain*'.⁷⁶¹ Nonetheless, while

objection, archipelagic status can be more easily protected even in cases where no baselines have been drawn.

⁷⁵⁷ CARON, *supra*, at 9.

⁷⁵⁸ SOONS, *supra*, at 216.

⁷⁵⁹ CARON, *supra*, at 9.

⁷⁶⁰ P. WEIL, 'Geographic Considerations in Maritime Delimitation', in J. J. CHARNEY and L. M. ALEXANDER (eds.), *International Maritime Boundaries*, 1993, (Dordrecht: Nijhoff), pp. 115-130, at 115. This principle has been consistently recognized by the International Court of Justice in several cases, as, in the *North Sea Continental Shelf*, 1969,: '*the land is the legal source of the power which a State may exercise over territorial extensions seaward*'

⁷⁶¹ A. SOONS, *supra*, at 211. Article 7 UNCLOS (straight baselines), completed by Article 47 UNCLOS (special ratios of archipelagic baselines).

the close correlation between the shape of the coastline and the direction of the baseline is undisputed, D. Caron recalls that when the law of baselines was first formulated in the 1930s and then revised in the 1970s, sea-level rise or the transformation of features due to the adverse impacts of climate change were not in the minds of the authors. Indeed, as he holds, '*despite [the fact] that coastline erosion is common, they apparently viewed such changes as rare and isolated*'.⁷⁶²

It is therefore not surprising that UNCLOS does not explicitly specify the ambulatory nature of baselines (and outer maritime boundaries). Yet, the majority of scholars seem to agree that the correlation between the shape of the coastline and the baseline is inter-temporal and implies its necessary adaptation to the new coastal geography of the land. This appreciation can be solidly grounded in three arguments. First of all, as a corollary of the fundamental premise that 'the land governs the sea', baselines depend on whether the State's title to the land survives, is maintained or sustained.⁷⁶³ Secondly, ambulatory baselines and outer maritime boundaries are not incompatible with UNCLOS, since the possibility of the regression of baselines is contemplated in Article 7(2) on deltaic baselines.⁷⁶⁴ Moreover, it has been argued that Article 76(9), which establishes that (under certain conditions) the outer limits of the continental shelf are permanently fixed,⁷⁶⁵ allows the *a contrario* conclusion that the outer limits of all other maritime zones might only be temporary.⁷⁶⁶ All in all, while the ambulatory or changing nature of baselines and outer maritime boundaries seems uncontroversial, the eventual level of protection against such modifications offered by claiming archipelagic status without drawn archipelagic lines remains uncertain. In contrast, those States which have published their archipelagic lines may be protected from changes as long as they do not update the information of the charts provided to the UN Secretary-General (Article 47(9) of UNCLOS).

3.1.2. Coastal Geographical Transformation and Maritime Delimitation Agreements

⁷⁶² CARON, at 5.

⁷⁶³ This is the position of A. H. A. SOONS, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', (1990) *Netherlands International Law Review*, vol. 37, pp. 207-232.

⁷⁶⁴ UNCLOS Article 7(2) – on deltaic baselines.

⁷⁶⁵ UNCLOS, Article 76(9) – on the continental shelf.

⁷⁶⁶ J. GROTE STOUTENBURG, 'Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise' (2011) *International Journal of Maritime and Coastal Law*, vol. 26, pp. 263-311, at 269. A. Soons recalls that the reason for fixing continental shelf outer boundaries was that seabed exploitation implies high levels of investment. In A. SOONS, *supra*, at 217. This provision was intended to permanently fix the boundary between the continental shelf and the international seabed area in view of the legal security question which is of great importance for the holders of mining concessions.

Maritime Delimitation Agreements in the Pacific Region

As illustrated in the previous section, most maritime boundaries in the South Pacific remain undelimited – or, at best, have been the object of maritime delimitation agreements which are not yet operative because the respective Parties have not yet perfected their consent through ratification. Indeed, of the twenty-one bilateral maritime delimitation agreements that have been signed in the region (including one preliminary exchange of notes between France (Wallis and Futuna) and Tuvalu), only seven have been ratified and are currently in force. Until recently, these bilateral treaties necessarily involved at least one former colonial or administrating power willing to clarify, after decolonization, the maritime boundaries generated by them just prior to the end of their colonial presence in the region. In cases where the other Party is not France, the United Kingdom, the United States of America, New Zealand or Australia, the agreements involve Pacific Island States likely to generate important economic or political interests, such as Papua New Guinea (mineral producer and the richest country of the region), and Fiji (second most populated Pacific island State); or those remaining politically linked to their former colonial or administrating power under a Compact of Free Association, such as the Cook Islands, Niue or Tokelau.

Considering the economic burden that scientific surveys of the coastal zones represent, the newly decolonized and underdeveloped Pacific Island States did not initiate negotiations on this matter until very recently. With support from the South Pacific Applied Geoscience Commission (SOPAC) through the Regional Maritime Boundaries Project Initiative, sub-regional co-operation among the three States formerly integrated into the UN Strategic Pacific Trust Territory led to the conclusion in 2006 of two maritime delimitation agreements between the Federated States of Micronesia and its respective western and eastern neighbours, Palau and the Marshall Islands; the former agreement having entered into force in 2008. Similarly, direct legal and technical assistance from the Special Advisory Services Commission (SASC) of the Commonwealth Secretariat and of the Australian Attorney-General's Office and the Pacific Islands Forum very recently fostered the historical signing, on 29 August 2012, of seven maritime delimitation agreements among Pacific Island States. Five of them were bilateral agreements between Kiribati – the Pacific island State with the widest maritime area of the region – and all its neighbours: (1) Tuvalu; (2) Cook Islands (New Zealand); (3) Niue (New Zealand); (4) Tokelau (New Zealand); and (5) the Marshall Islands; one was a trilateral agreement (6) among Kiribati, Nauru and the Marshall Islands, concerning the determination

of the tri-junction point where the EEZs of the three States intersect; one other was a bilateral maritime delimitation agreement (7) between Nauru and the Marshall Islands. This unique signing took place during the 43rd Pacific Islands Forum on 'Large Ocean Island States: the Pacific Challenge', held in Rarotonga (Cook Islands) on 30 August 2012.⁷⁶⁷ Although, of the eight maritime delimitation agreements involving underdeveloped Pacific Island States rather than former colonial powers, only one (FSM/Palau) has come into force, this move is to be applauded and already indicates how serious steps are being taken by Kiribati to defend its territorial boundaries.

Other than the famous 1978 Torres Strait agreement between Papua New Guinea and Australia, which achieved a comprehensive settlement on a wide range of complex issues,⁷⁶⁸ the primary objective of these fourteen agreements is to divide their overlapping maritime zones and/or their continental shelf, presumably in view of the economic merits of the zone for exploitation of the living and seabed resources.⁷⁶⁹ On some occasions, political, historical and strategic reasons have also played an important role, as in the 1980 Treaty between the Cook Islands and American Samoa in which the United States recognized the sovereignty of the Cook Islands over four islands (Pukapuka, Manahiki, Rakatanga and Penrhyn) formerly administered by New Zealand and claimed by the USA since the 19th century. Another prominent example can be found in the 1983 Agreement between Fiji and Wallis and Futuna (France), which has not yet come into force because of its association with the only outstanding territorial dispute of the region, between Vanuatu and France, on sovereignty over the Matthew and Hunter Islands.⁷⁷⁰ Finally, some Treaties embrace wider purposes,

⁷⁶⁷ Official Press release from the Commonwealth Secretariat available at: <http://www.thecommonwealth.org/news/249480/290812maritimeboundaries.htm>.

⁷⁶⁸ Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, signed 18 December 1978; entered into force 15 February 1985. This treaty required six years of negotiation meetings between Australia and its former dependent territory, and is generally noted for its achievement of a comprehensive settlement of a wide range of issues, including the highly complicated geographical situation of the Parties in some areas such as the Torres Strait, where the delimitation line required negotiation on many island features.

⁷⁶⁹ Including transboundary highly migratory species such as tuna (Federated States of Micronesia/Marshall Islands and Federated States of Micronesia/Palau). For instance, an outstanding dispute is that of Tonga and Fiji over the North and South Minerva Reefs: while Tonga claimed sovereignty in 1972, renaming them Teleki Tokelau and Teleki Tonga, respectively. Fiji has placed them on the edge of its own EEZ, CHARNEY and ALEXANDER (eds.), *International Maritime Boundaries*, *supra*, Report 5-8, at 1012.

⁷⁷⁰ Within three months of the signature of the Fiji/France (Wallis and Futuna) Agreement. While the conclusion seems to strengthen the French claim over the Hunter and Matthew Islands, France accepted in return the use by Fiji of the 2-metre-high cay of Theva-i-ra (formerly Conway Reef) as one of its base points. Used by Fiji as a model of a maritime agreement.

establishing a framework for subregional co-operation in environmental matters or the protection of indigenous peoples' traditional areas of fishing. These can be found in the two most recent agreements, concluded by the Federated States of Micronesia with Palau and with the Marshall Islands, which interestingly introduced clauses responding to the eventual adverse effects of climate change on their delimitation line.

A compilation of the twenty-one existing maritime delimitation agreements (of which only seven are in force) in the Pacific region is provided in Table 3, below. Based on a reading of the Agreements themselves and the explanations provided in the reports of J. J. Charney and L. M. Alexander, the Table summarizes the main characteristics of each of them, including the method of delimitation, the name and geological composition and degree of vulnerability (according to the same vulnerability test given in Table 2 of the features which served as base points of the delimitation line), and whether the Parties have specified the exact location of the boundary by listing the geodetic co-ordinates of the points composing such line.

Table 3: Climate-Change Effects and Maritime Delimitation Agreements in Force in the Pacific Region

| Agreement (Signature – Entry into Force) | Length of Delimitation Line | Zones Delimited | Nº of Segments | Method(s) of delimitation | BASEPOINTS | | | Location of Delimitation Points |
|---|-----------------------------|---|----------------|---|---------------|------------------------|-------------------------------|---|
| | | | | | Name | Type | Degree of Vulnerability (1-5) | |
| 1978–1985 Australia/Papua New Guinea | X | TS Seabed Fisheries Protected Zone | 20 | AJUSTED EQUIDISTANCE + STRAIGHT LINES (Torres Strait) | Warrior Reef | Reef | 5 | GEODETTIC CO-ORDINATES |
| | | | | | Pearcy Cay | Cay | 5 | |
| | | | | | Kawa | Coral Atoll (<5m) | 5 | |
| | | | | | Mata Kawa | Coral Atoll (<5m) | 5 | |
| | | | | | Kussa | Coral Island (19m) | 5 | |
| 1980–1980 France (Wallis and Futuna)/Tonga | 220n.m. | EEZ | 2 | EQUIDISTANCE | Futuna | Volcanic Island (765m) | 1 | NO EXACT LOCATION OF DELIMITATION POINTS Article 3. B). Use of ‘Available cartographic and geodesic data’ to draw up the relevant cartographic documents by mutual agreement. Article 3.C). ‘Technical corrections’ would be made ‘at some future date’, as necessary to update these data (triggered by exchange of letters) |
| | | | | | Niua Fo’ou | Volcanic Crater (205m) | 1 | |
| | | | | | Minerva Reefs | Reef | 5 | |

| | | | | | | | | |
|--|--|--|--|---|----------------|-------------------------------|---|---|
| 1980–1983 Cook Islands/USA (American Samoa) | 566n.m. | All-Purpose Boundary EEZ (Since 1983 US claim) | 24 | EQUIDISTANCE + FULL EFFECT OF ALL FEATURES | Pukapuka | Coral Atoll (<5m) | 5 | GEODESIC CO-ORDINATES (WGS 72 + charts and aerial plans of 9 features) |
| | | | | | Nassau | Coral Atoll (<5m) | 5 | |
| | | | | | Suvarrow | Coral Atoll (<5m) | 5 | |
| | | | | | Palmerston | Coral Atoll (<5m) | 5 | |
| | | | | | Rose | Coral Atoll (<5m) | 5 | |
| | | | | | Manua | Continental Island (964m) | 1 | |
| | | | | | Swains | Coral Atoll (<5m) | 5 | |
| 1982–1983 Australia/France (New Caledonia) | 1200n.m. | Fisheries Zone (Australia 1979 claim) EEZ (France 1978 claim) | 21 | PARTIALLY AJUSTED EQUIDISTANCE + STRAIGHT LINES + FULL EFFECT OF MIDDLETON REEF | Middleton Reef | Low-Tide Elevation | 5 | GEODESIC CO-ORDINATES (WGS 72) |
| | | | | | Norfolk | Old Volcanic Island (318m) | 1 | |
| | | | | | Walpole | Raised Coral Island (100m) | 4 | |
| | | | | | Matthew | Active Volcanic Island (117m) | 1 | |
| | | | | | Hunter | Active Volcanic Island (266m) | 1 | |
| 1983–** Fiji/France (New Caledonia, Wallis and Futuna) | South West Line: 320n.m. North East Line: 240n.m. | EEZ | South West Line: 1 North East Line: 4 | SLIGHTLY AJUSTED EQUIDISTANCE | Theva-I-Ra | Island | 5 | GEODESIC CO-ORDINATES (WGS 72) |
| | | | | | Hunter | Active Volcanic Island (266m) | 1 | |
| | | | | | Futuna | Volcanic Island | 1 | |

| | | | | | | | | |
|--|---------------------------------------|---|------------------|------------------------|--------------------|------------------------------|---|---|
| 1983–1984 France (French Polynesia)/UK (Pitcairn, Henderson, Ducie and Oeno Islands) | 350n.m. | EEZ | 5 | STRICT EQUIDISTANCE | Temoe | Coral Atoll (<5m) | 5 | GEODESIC CO-ORDINATES + LOXODROME LINES Doubts about precise location of islands |
| | | | | | Marutea | Coral Atoll (<5m) | 5 | |
| | | | | | Pitcairn | Volcanic Island (347m) | 1 | |
| | | | | | Oeno | Coral Atoll (<5m) | 5 | |
| 1985–1985 (Exchange of notes, Interim Arrangement) France (Wallis and Futuna)/Tuvalu | 300n.m. | EEZ Extended CS Possible (Tuvalu) | To be determined | EQUIDISTANCE | NOT SPECIFIED | NOT SPECIFIED | X | NO EXACT LOCATION OF DELIMITATION POINTS ABSENCE OF APPROPRIATE CHARTS RELEVANT BASELINES TO BE DEFINED BY SOPAC (Presence of reefs and Tuvalu’s archipelagic status) |
| 1988–** Australia/Solomon Islands | 150n.m. | Fisheries Zone | 2 | EQUIDISTANCE | Mellish Reef | Reef | 5 | GEODESIC CO-ORDINATES (Point U: 1996 Australian Geodetic Datum; Points V and R1: WGS 72) |
| | | EEZ | | | Indispensable Reef | Reef/Low-Tide Elevation | 5 | |
| 1989–** France (New Caledonia)/Solomon Islands | CONTENTS OF THIS TREATY NOT AVAILABLE | | | | | | | |
| 1989–** Papua New | 1000n.m. | TS | 12 | AJUSTED | Pocklington | Reef | 5 | GEODETIC CO-ORDINATES |
| | | EEZ | | | Bougainville | High Volcanic Island (2792m) | 1 | |

| | | | | | | | | | | |
|--|---------|----------------------|----|----------------------|---------------|---|---|---|--|--|
| Guinea/Solomon Islands | | CS Protected Zones | | EQUIDISTANCE | Shortland | Volcanic and Raised Coral Island (234m) | 5 | | | |
| 1997–** Niue (New Zealand)/USA (American Samoa) | 279n.m. | All-Purpose Boundary | 18 | EQUIDISTANCE | Niue | Raised Coral Island (76m) | 4 | GEODETTIC CO-ORDINATES (American Datum NAD 83 and WGS 84) New coastal geodetic positioning required to update information on location of base points | | |
| | | | | | Not specified | X | X | | | |
| 2003–2003 France (Wallis and Futuna)/New Zealand (Tokelau) | 101n.m. | All-Purpose Boundary | 2 | EQUIDISTANCE | Wallis | High Volcanic Island (765m) | 1 | GEODETTIC CO-ORDINATES (WGS 84) | | |
| | | | | | Futuna | High Volcanic Island (765m) | 1 | | | |
| | | | | | Nukunonu | Coral Atoll (<5m) | 5 | | | |
| | | | | | Atafu | Coral Atoll (<5m) | 5 | | | |
| 2006–** Federated States of Micronesia/Marshall Islands | 755n.m. | EEZ | 10 | AJUSTED EQUIDISTANCE | Kosrae | High Volcanic Island (628m) | 1 | GEODETTIC CO-ORDINATES (WGS 84) Article 1.5) Significant shifts in the geographic location of islands used as base points may imply revision of co-ordinates of the agreed line. | | |
| | | | | | Pingelap | Coral Atoll (<5m) | 5 | | | |
| | | | | | Mwokil | Coral Atoll (<5m) | 5 | | | |
| | | CS | | | Pohnpei | Volcanic Island (721 m) | 1 | | | |
| | | | | | Ebon | Coral Atoll (<5m) | 5 | | | |
| | | | | | Namidrik | Coral Atoll (<5m) | 5 | | | |

| | | | | | | | | |
|--|--|---------------------|----|--------------|---|-------------------|---|---|
| | | | | | Ujae | Coral Atoll (<5m) | 5 | |
| | | | | | Ujelang | Coral Atoll (<5m) | 5 | |
| 2006–2008 Federated States of Micronesia/Palau | 400n.m. | EEZ | 50 | EQUIDISTANCE | Ngulu | Coral Atoll (<5m) | 5 | GEODESIC CO-ORDINATES Use of reefs by both Parties although Palau 2003 legislation imposes that baselines must be drawn from specific features |
| | | Yap | | | Continental/Old Volcanic Island (173m) | 1 | | |
| | | Northern Islands | | | Diversity of Features, Including Unspecified | 5 | | |
| 2012– ** Kiribati/Cook Islands | CONTENTS OF THESE TREATIES NOT YET AVAILABLE | | | | | | | |
| 2012–** Kiribati/Nauru | | | | | | | | |
| 2012–** Kiribati/Niue (NZ) | | | | | | | | |
| 2012–** Kiribati/Tokelau (NZ) | | | | | | | | |
| 2012–** Kiribati/Marshall Islands | | | | | | | | |
| 2012–** Kiribati/Nauru/Marshall Islands | | | | | | | | |
| 2012–** Nauru/Marshall Islands | | | | | | | | |

Source: *Personal Elaboration with Data from the Global Island Database (UNEP Island Directory), the UN-UNEP System Wide Earth Watch and International Maritime Boundaries:* <<http://gid.unep-wcmc.org/>; <http://islands.unep.ch/Cindex.htm>>, completed with data from J. J. Charney and L. M. Alexander (eds.), *International Maritime Boundaries*, vols. 1-6 (1993-2005).

NOTE: COMPLETE REFERENCES OF THESE TREATIES ARE LISTED IN THE BIBLIOGRAPHY.

The following analysis is based on the information available, which concerns only 14 out of the 21 signed agreements listed above. Agreements signed in 2012 have not yet been publicly displayed. Of the 50 features listed in Table 3 which served as base points in the fourteen delimitation agreements, the content of which is available, 34 can be considered as highly vulnerable to sea-level rise and coastal erosion. These changes are, in principle, likely to provoke important redrawing of the baselines used for the boundary agreements – although the extent of their impact on the baseline may be alleviated in cases where the Parties have agreed not to give full effect to the features at stake. Yet, in contrast to situations involving undelimited maritime boundaries, the modification of the baselines does not necessarily have a mirroring effect on agreed delimitation boundaries.

First of all, in the course of the negotiations, Parties may agree either to delimit their maritime zones by an equidistant or median line, or choose to adjust the equidistant line in cases where the geographical conditions of the coast or any specific political considerations require such adaptation. Of the 14 agreements in the Pacific region the content of which is available, 6 have departed from the strict equidistant line (of which, 3 are in force). Secondly, Parties generally specify the geodetic co-ordinates of a succession of points composing the delimitation line and include such data in the main body of the Treaty or in an annex, irrespective of whether the delimitation line agreed upon is strictly equidistant or has undergone adjustments. In doing so, the delimitation line is virtually fixed or ‘frozen’, as in the majority of the agreements listed (11 out the 14 agreements for which information is available, and 7 of which are in force). In contrast, the Parties may decide to merely make a reference in the agreement to the median line as constituting the agreed boundary line, without providing the geodetic co-ordinates of the delimitations points. In these cases, the boundary is not fixed and can be presumed to fluctuate in accordance with the changes undergone by the relevant baselines.⁷⁷¹ This is the case of the following maritime agreements: France (Wallis and Futuna)/Tonga; Federated States of Micronesia/Palau (both in force); and Federated States of Micronesia/Marshall Islands (not yet in force).

Therefore, the consequences of sea-level rise and coastal erosion for the maritime entitlements of Pacific Island States may radically differ, from treaties with fixed boundaries to agreements with unfixed boundaries. On the one hand, the change in the location of the

⁷⁷¹ SOONS, *supra*, at 227: ‘In cases where the delimitation agreement explicitly refers to the median line the boundary may shift as a result of sea level rise: asymmetrical changes of the baselines of both states will lead to changes in the location of the median line. The states concerned have opted for a potentially fluctuating boundary line.’

delimitation lines of the France/Tonga, FSM/ Marshall Islands and FSM/Palau agreements may be simply triggered by a request of one of the Parties to update the scientific information of both Parties' coastline. On the other hand, all other Treaties with fixed the delimitation points establish permanent and acquired territorial rights which cannot be modified unless the Treaty is terminated by lawful means.

Some authors have raised the question of whether a Party can claim a fundamental change of circumstances to terminate a maritime delimitation agreement, as recognized in general international law and codified in Article 62(1) of the Vienna Convention on the Law of Treaties. In principle, this could be raised by a Party that considers that its counterpart's coastline has undergone substantial geographical modifications which decompensate the original balance of the delimitation line and prevent the claimant from potentially increasing the scope of its maritime entitlements. It would therefore seem to incentivize 'aggressive' or 'expansionist' claims rather than to serve as a protective or defensive device against the loss of already acquired maritime entitlements, a trend which could possibly generate interstate conflicts.⁷⁷² It is therefore perfectly understandable why treaties establishing a boundary explicitly exclude the possibility of claiming a fundamental change of circumstances under Article 62(2) of the Vienna Convention on the Law of Treaties (VCLT). Moreover, the applicability of this exception is, in any case, subject to very stringent conditions which do not seem to be met in these cases. First of all, the circumstances motivating the claim must not have been foreseen by the Parties at the time of the conclusion of the Treaty. Considering that the dangerous effects of sea-level rise on small island States were without doubt known by Pacific Island States by 1984, when the Maldives clearly introduced the issue into the Commonwealth agenda and then into that of the UN General Assembly, States Parties to delimitation agreements concluded that after 1984 they could have taken it into consideration during the negotiations. Secondly, the changes must affect original circumstances '*the existence of which constituted an essential basis of the consent of parties to be bound by the treaty*' (Article 62(2) VCLT). Such a condition introduces de facto a *probatio diabolica*, particularly in cases where the agreed delimitation line is simply the strict median or

⁷⁷² J. LUSTHAUS, 'Shifting Sands: Sea-Level Rise, Maritime Boundaries and Inter-State Conflict' (2010) *Politics*, vol. 30, n° 2, pp. 113-118; and D. CARON, 'Climate Change, Sea-Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict', in S.-Y. HONG, and J. VAN DYKE, *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea*, 2009, (Leiden-Boston: Martinus Nijhoff), chapter I, pp. 1-17. Also a concern mentioned in the 2009 UN Secretary-General's Report on Climate Change and International Security, *supra*.

equidistant line.⁷⁷³ Finally, the changes involved must be ‘fundamental’, so as to transform the extent of the obligations still to be performed under the Treaty. Perhaps this last condition is the only one that could be met in all cases, since the disappearance of an island or severe coastal recession can substantially affect the baseline.⁷⁷⁴

Having discarded this possibility, it can be concluded that delimited maritime boundaries shield maritime entitlements of the Parties involved – in cases where the Parties decide to establish the co-ordinates of the delimitation points – or at least enable Pacific Island States to decide and control what effects they recognize as being due to foreseen adverse impacts of climate change – in cases where the agreement does not provide the co-ordinates of the delimitation line. The freezing effect of the delimitation agreement is all the more important given that, as J. Grote Stoutenburg recalls, it falls within the ‘objective’ or the ‘status’ of contracts which are an exception to the *pacta terti rule* of Article 34 of the Vienna Convention on the Law of Treaties and which produce effects beyond the Treaty Parties involved.⁷⁷⁵ Of the 14 agreements signed in the region, the content of which is available, only 3 may really see the location of the boundary modified: France (Wallis and Futuna)/Tonga, Federated States of Micronesia/Palau and Federated States of Micronesia/Marshall Islands. Given that only the first two of these three agreements are in force, it can be concluded that only the maritime entitlements of four States (France, Tonga, FSM and Palau) may be really at stake, and that ‘partial de-territorialization’ would arise for the latter three Pacific Island States. Yet, despite the fact that the 11 remaining agreements have fixed maritime delimitation lines, present awareness of the impacts of sea-level rise and coastal erosion may delay even more or perhaps even prevent the 6 agreements not yet in force from being ratified. Eventual movements of these delimitation lines can, in some cases, become dangerous points of international conflict. For instance, the boundary that was agreed by the Solomon Islands and Papua New Guinea, signed but not yet ratified, involves Bougainville Island, centre of an important secessionist movement which drove Papua New Guinea into four years of civil strife. Likewise, the still pending ratification of the agreement between France (New Caledonia) and Fiji – which apparently favours French claims against Vanuatu

⁷⁷³ Consent on adjusted lines becomes more explicit since compromises among the Parties are justified and appeared so explicitly during the negotiation period, while the application of the strict equidistance may signify an adherence to the principle of fair and equitable delimitation of maritime zones rather than to the line that takes into account specific base points with specific effects.

⁷⁷⁴ Contra, CARON, *supra*, at 641: ‘it is entirely plausible that a State might argue that circumstances had changed in that the parties had not foreseen such a rise in sea level’.

⁷⁷⁵ GROTE STOUTENBURG, *supra*, at 280.

over the Hunter and Mathew Islands, may have an impact on this still outstanding territorial dispute in the region.

3.2. Preventive and Responsive Measures against the Loss of Maritime Spaces

3.2.1. Physical Devices: Mainstreaming Coastal-Protection Strategies in National Climate-Change Adaptation Plans

Actions seeking to prevent de-territorialization (physical and/or legal) are a reflection of the tension between the need for minimum physical and economic viability of a political entity to continue to be considered a State and the ethical, political and legal will to find avenues by which to stretch those minimum standards as far as possible. Eventually, it may even involve finding alternative approaches to statehood after the maximum extension of such minimum standards is achieved, as will be developed below.⁷⁷⁶ When dealing with the partial de-territorialization scenario described above, measures seeking to either prevent or react against the effects of sea-level rise and coastal erosion on Pacific Island States' maritime entitlements are mixed in nature: whilst physical actions respond to the evolution of the geographical transformation of the coastline, legal proposals seek to preserve the maritime rights of Pacific Island States in spite of the geographical transformation of their coastlines.

There is a wide range of technological tools and socio-economic policies which can be implemented for coastal protection or shoreline preservation without necessarily affecting the consideration of the features as islands under Article 121(1) UNCLOS. Conceptually, these devices can be considered as adaptive measures to the adverse impacts of climate change on Pacific Island States' maritime entitlements, and can be divided into two main types. The category of technological tools includes soft engineering devices, such as beach replenishment and artificial enhancement or elevation of beaches, proposed since 1990 by the IPCC Coastal Management Subgroup as Strategies for Adaptation to Sea-Level Rise.⁷⁷⁷ They are followed by more aggressive engineering devices, such as the construction of sea walls, as effectively put in place in the Maldives around its capital atoll Malé, or even artificial platforms within the State's EEZ, as developed by Japan to prevent Okinotorishima from becoming submerged.⁷⁷⁸

⁷⁷⁶ Physical and economic viability of the political entity are very closely intertwined.

⁷⁷⁷ J. DRONKERS et al., *Strategies for Adaptation to Sea Level Rise*, Report of the IPCC Coastal Zone Management Subgroup: Intergovernmental Panel on Climate Change, 1990, (Geneva: Intergovernmental Panel on Climate Change), 148 pp.

⁷⁷⁸ Article 60 UNCLOS indicates that these do not generate any maritime zones. Artificial platforms can be more controversial. See C. DI LEVA and S. MORITA, 'Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?', (2008) *World Bank, Law and Development Working Paper Series n°5*, 52pp.

These hard engineering devices have nonetheless been criticized for various reasons. As pointed out by J. Grote Stoutenburg, the construction of sea walls is a very limited solution, given that it cannot be extended to all the features which serve as base points and constitutes an '*economically inefficient behaviour*'.⁷⁷⁹ He also highlights how this solution may be counterproductive both from a socio-economic and an environmental perspective. On the one hand, sea walls can lead to the erosion of beaches and other sediments. Thus, while stabilizing the high-water mark, they may foster the landward displacement of the low-water mark – determining the baselines – to the foot of the sea wall. On the other hand, the construction of sea walls in larger islands may affect their appeal as tourist destinations, an economic sector which Tuvalu, for instance, has been particularly keen to develop in the last decade. Moreover, other than the negative side-effect on the economic development of an island subject to the construction of a sea wall, an important decrease in the economic viability of the feature could arguably be used against the interested State to call into question the continued inclusion of the feature in the island category (as defined by Article 121(1) of UNCLOS) and to argue that it should be reclassified as either a '*rock which cannot sustain human habitation or economic life of its own*' (Article 121(3) UNCLOS) or as an artificial island (Article 60 UNCLOS).⁷⁸⁰

Considering the high costs generated by such technological tools, as well as the potential side-effects they may generate from an environmental, economic and legal perspective, the development of wider socio-economic frameworks appears all the more fundamental. As indicated by Charles di Leva and Sachito Morita, adaptation policies may thus include early-warning mechanisms and the introduction of coastal zoning and risk-management plans into national development plans and into appropriate national climate change adaptation plans (NAPAs). It may even be advocated that more radical changes in the economic development models of these island States should be pursued, as recently implemented by the Maldives, which has attracted green technology investment and aspires to become the first carbon-neutral economy of the planet.

3.2.2. Legal Devices: Protecting Maritime Boundaries by Ratifying Maritime Delimitation Agreements, Fixing Baselines and Effecting Archipelagic Status

⁷⁷⁹ STOUTENBURG, *supra*, at 277: '*[S]tates are incentivized to commit resources not where mostly needed, but in parts of their territory where they are necessary to retain their legal entitlements*'.

⁷⁸⁰ This is, for instance, the position of Van Dyke on Okinotorishima, who defends it for an artificial island when total disappearance of the island is possible. This however can be fought from a legal perspective by endorsing the narrower interpretations of Article 121(1) UNCLOS.

Considering the economic burden that the physical and policy devices depicted above constitute for underdeveloped and mostly agricultural countries such as the Pacific Island States, scholars concerned with the potential loss of maritime territorial spaces have started to advocate different legal solutions, which could be raised by the concerned States, both as a possible complement to the artificial means of shoreline protection and irrespective of the cost and difficulty of their implementation.

To be sure, in cases where a maritime delimitation agreement has been signed, the most immediate legal device to ensure the final preservation of the maritime spaces of the Parties involved is the ratification of the Treaty by all Parties so that it can enter into force. This is particularly important in cases where the Parties involved are Kiribati, Tuvalu or the Marshall Islands – three countries composed exclusively of coral atolls, for the base points used to trace the boundary are most likely to be highly vulnerable to climate change impacts and susceptible to disappearance or undergoing severe coastal recession. Henceforth, although the signature and adoption of the five bilateral Treaties between Kiribati and (1) Nauru, (2) Cook Islands (New Zealand), (3) Tuvalu, (4) Niue (New Zealand) and (5) Tokelau (New Zealand), one trilateral Treaty involving Kiribati, Nauru and the Marshall Islands, one bilateral agreement between Nauru and the Marshall Islands, and one bilateral agreement between the Federated States of Micronesia and the Marshall Islands already generate the obligation of the Parties involved to refrain from acts which may defeat the object and purpose of the Treaties,⁷⁸¹ their final consent to the obligations set up in the Treaties involved would make a very import difference and operate as a safeguard of the maritime spaces of the respective States. Their recent signature is a sign that the awareness of these countries is in the right direction; yet, ratification should be promoted for the full operation of the protection offered by these Treaties to be finally displayed.

In the absence of a maritime delimitation agreement fixing the boundary between two facing or adjacent States, the focus shifts towards means of preserving the original location of the baselines, which may have been modified by total submersion or important coastal erosion of key base points. Undoubtedly, the simplest way for island States to achieve this objective is the publication of their baselines in official charts. This solution, referred to by J. Grote Stoutenburg as ‘masterly inactivity’, virtually constitutes a de facto stabilization of their maritime zones, since the location of their baselines will be preserved until the State concerned decides to update the survey of its coastline and produce new charts in which

⁷⁸¹ Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980, 1155 U.N.T.S. 331, Article 18.

coastal geographical changes would be incorporated.⁷⁸² Truly enough, what begins with the legal depiction of the geographical characteristics of a coastal State, released in an official format and important for navigational purposes, eventually becomes an artificial legal construct which sustains a factual reality that may no longer match the real coastal scenario. Yet, such a legal construct, supported by the weight and continuation of the past facts – becoming at present a *fait accompli* – can at least give the affected States temporary protection: effective as long as their official charts are not challenged by other States. Moreover, as Alex Oude Elferink argues, States (such as Kiribati and Tuvalu) which are not yet able to afford the scientific surveys necessary to produce official charts would still be entitled to claim the entire suite of maritime zones, for it appears that the applicability of Article 121(3) UNCLOS can be suspended for rocks which are part of an archipelago.⁷⁸³

Another legal solution proposed, for instance, by M. Hayashi and J. Stoutenburg,⁷⁸⁴ involves a higher level of international co-operation. These authors suggest the development of collective implementation mechanisms of a new regime of stable maritime zones, through either a UN General Assembly resolution on stable maritime zones or the adoption of an Implementation Agreement on Sea-Level Rise which would provide for stable maritime zones and could complement the 1994 Implementation Agreement of UNCLOS.⁷⁸⁵ While this proposal inconveniently relies on gathering sufficient political support, which may take a long time, it would certainly be beneficial to Pacific Island States that do not have official charts showing the outer boundaries of their archipelagic lines, like Kiribati and Tuvalu, granting them a *de iure* protection of their baselines – while ratification of the set of treaties remains pending. Thereby, a combination of both legal strategies – production when possible and publication of official charts or at least their formal claim to archipelagic status, while negotiating in parallel the implementation of a new regime of stable maritime zones – could provide for a more comprehensive protection.

4. SCENARIO 2. TOTAL DE-TERRITORIALIZATION OF PACIFIC ISLAND STATES: UNCERTAIN EFFECTS ON THE CONTINUATION OF THE STATE

⁷⁸² GROTE STOUTENBURG, *supra*, at 279.

⁷⁸³ A.G.O ELFERINK, 'Clarifying Article 121(3) of the Law of the Sea Convention: the Limits Set by the Nature of International Legal Processes', (1998) *Boundary Security Bulletin*, vol. 6, issue 2, at 59.

⁷⁸⁴ M. HAYASHI, 'Sea-Level Rise and the Law of the Sea: Legal and Policy Options', (2009) *Proceedings of the International Symposium on Islands and Oceans, Ocean Policy and Research Foundation*, pp. 78-90; and GROTE STOUTENBURG, *supra*, at 293-295.

⁷⁸⁵ By extension or *lex lata* of Article 76(9) UNCLOS on the permanent outer limits of the continental shelf'.

While the effects of sea-level rise and coastal erosion on Pacific Island States' maritime territorial dimension is the most immediate territorial issue they have to face, what the region genuinely fears (as the Climate Change and International Security Discourse before universal organizations revealed) is the prospect of a total territorial loss scenario. If partial de-territorialization – when climate change effects provoke the retreat of the shorelines and may even submerge entire topographical features – affects the terrestrial and maritime spatial dimension of the twelve independent States of the region and can potentially be exported to the Caribbean and the Indian Ocean as well, the total de-territorialization scenario covers (at least for the time being) a more restricted manifestation of the problem. Of the 193 States that currently exist, only four are undeniably under the threat of total loss of their territory, for they consist *exclusively* of low-lying features with an altitude of less than 5 metres and do not count with volcanic or continental islands. Three of these States are in the Pacific – the Marshall Islands, Kiribati and Tuvalu; the fourth is the Maldives in the Indian Ocean. The prospect of these four cases of total territorial disappearance brings the central question of the role of the territory in international law (dealt with above in section 2 of the present chapter) back to the fore.

The opening section of this chapter explored the role of the concept of territory in the *creation of States* and stressed its contingent character by differentiating the historical context of the modern European State from that of the post-colonial Pacific island State. Three main legal theories on the territory concept, all stemming from the concept of the modern European State, were analysed to explain the specific role of territory in the Pacific following decolonization. In contrast, the present section deals with the role of territory in the *continuation of the State* by questioning whether the total disappearance of the spatial dimension of a State necessarily implies the loss of its international legal personality. Bearing in mind that the natural bias of the international legal order towards stability and order generally favours the maintenance of existing structures, the functions of and legal theories on territory attached to the creation of States is not automatically mirrored in the consideration of the place of territory in the continuation of States.

Thereby, what may appear as farfetched proposals by scholars willing to defend the legal survival of Pacific Island States merits thorough consideration. These solutions can be divided into two main types. First of all, scholars have pointed to strategies seeking to maintain and even produce some sort of territorial dimension of the State, which I refer to as 're-territorialization strategies', and generally involve the use of territory of other States under different legal forms. Secondly, considering the impossible maintenance of a State's spatial

dimension, *ultima ratio* proposals advocate the continuation of de-territorialized States' international legal personality, as a new form of 'non-State sovereign entities', and base such proposals on the precedents offered by the Holy See and the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta (hereafter referred to as the Order of Malta). Other than considering and balancing the merits of these two types of solution from the standpoint of their feasibility, the present chapter argues that they must be approached by the functionalist method as applied to the role of territory in the creation of States. Thus, the fundamental question is not *how* Kiribati, Tuvalu, the Marshall Islands may preserve – in theory and in practice – their international legal personality despite having been deprived of their spatial dimension, but *why* should their continuation be assured in these extreme circumstances? Which specific purpose(s) would be fulfilled, should the survival of these political entities either as States or as non-State sovereign entities be acknowledged by the international community? All in all, at the heart of this issue lies one of the most long-standing riddles of modern political theory, namely, the question: What is the function of the State? Ultimately, this outstanding issue arises today in association with a new question of moral and ecological philosophy, which will be dealt with more extensively in Chapter 6: May de-territorialized States rely on specific ethical grounds to sustain their claims in favour of the survival of their international legal personality? Could they even claim recognition of their survival as compensation for severe environmental harm?⁷⁸⁶

4.1. Fighting for the Continuation of the State through 'Re-territorialization' Strategies

4.1.1. Land Acquisition by Cession or Purchase from another State

Alongside and complementary to measures already mentioned for shoreline protection, or construction of artificial platforms, the first type of scholarly proposals for preserving and producing the spatial dimension of the threatened States includes either acquisition of new land from or a merger with another State. Consistent with the influence of the Roman law tradition, the cession or the transfer of a part of the territory between States (by a treaty provision) is among the modes of acquisition and transfer of territory traditionally recognized as lawful under international law.⁷⁸⁷ The Pacific is not unfamiliar with either of the two.

⁷⁸⁶ These questions should form the basis of a new normative blueprint for defending the continuation of Pacific islands' international legal personality.

⁷⁸⁷ JENNINGS, *supra*, at 6.

Wishing to ensure its presence in the area, in 1898 Prussia purchased the Marianas and Caroline Islands from Spain, thereby lowering the boom on a massive colonial empire that had lasted for over three centuries.⁷⁸⁸ A second interesting precedent in the region involved the Fijian island of Rabi, purchased in 1941 by the British Phosphate Commission (BPC) for the purpose of relocating the inhabitants of the island of Banaba (formerly known as Ocean Island, today part of Kiribati) after the discovery of phosphate resources there.⁷⁸⁹ While the first case involved the transmission of a colonial territory from one State (Spain) to another (Prussia), the second case was more complex in that it involved the three partner governments of BPC (Australia, New Zealand and Britain) purchasing an island part of Fiji at a time when Fiji was not yet an independent entity, still being part of the British Empire. The precedents of purchase of land in the region took place within an overall context of colonial exploitation of natural resources and preceded the independence of the relevant political entities.

Nowadays, the idea is back on track within a radically different landscape. The possibility of buying land from another State has been suggested as a means to ensure the survival of low-lying island nations threatened by sea-level rise. First formulated in 2008 by the former president of the Maldives, Mohammed Nasheed, the idea was announced immediately after his election. The prospective creation of a Sovereign Wealth Fund in the Indian Ocean Island State, a sort of ultimate insurance policy sourced from tourist revenues, would finance the purchase of land abroad. Countries with similar cultural, religious traditions and

⁷⁸⁸ Today, the Marianas have been integrated into the USA, while the Caroline Islands are part of the Federated States of Micronesia.

⁷⁸⁹ During World War II, the Japanese forces in the Pacific occupied the phosphate islands of Banaba and Nauru and deported their inhabitants to other islands of Micronesia. When the Japanese surrendered to Australian troops, the 'accident of war' which had already made the Banabans a displaced people was soon seen by the BPC as a golden occasion to settle them in a different location. Hence, the Banabans were told that the island had become uninhabitable because of war damage and were collected from different prisoner-of-war camps in Micronesia, reassembled in Tarawa, and quickly transferred to Rabi (Fiji), under conditions which then proved to be flawed, including the condition that the relocation was for a period of only two years, at the end of which anyone wishing to return to Banaba would have their transport arranged at the expense of the Gilbert and Ellice Islands Colony Government. Most importantly, they were told that the resettlement would not impair their land rights in Banaba nor their right to access to any of the Banaban Funds. The inadequate settlement of roughly 4,000 Banabans in Rabi made them suffer from, *inter alia*, extreme lack of adequate shelter and severe undernourishment. Besides, following the respective independence of Fiji (1970) and Kiribati (1978), the legal status of the Banabans in both countries was unclear, leading to a situation of de facto statelessness. In Fiji, Banabans of Rabi were equated to Fijian Indians, until, in 2005, a 3-month period was opened for Banabans willing to gain citizenship by naturalization, to benefit from a waiver of the usual conditions and fees. In Kiribati, a seat is specifically reserved in the Parliament for a Banaban representative. Curiously enough, the original inhabitants of Rabi had previously been relocated to another Fijian island (Taveuni) in the mid-19th century. Their descendants claim the right to return to their island, threatening the Banabans again with the prospect of resettlement. See KING and SIGRAH, '*Te rii ni Banaba*' (2001), at: <www.banaba.com>.

meteorological conditions, such as India and Sri Lanka, were first suggested and appeared in the media as the possible future lands on the most paradigmatic face of the global environmental disaster. The term 'climate refugees' was coined, updating the early interest that UNEP had shown in the issue of environmental displacements,⁷⁹⁰ and informal talks were also said to have taken place between the Maldives and the governments of Australia and New Zealand.⁷⁹¹ Such a fascinating and appealing policy was one of the elements of a wider strategy put forward before international organizations, aiming at the introduction of climate change into the agendas of human rights institutions and, vice versa, of promoting a human rights approach into climate change negotiations.⁷⁹² Yet, as the Australian government denied the existence of any sort of informal agreement, and the Sovereign Wealth Fund was yet to be settled two years after the idea was first formulated, doubts about the real intentions of ex-president Nasheed on this matter started to flourish.⁷⁹³ It was later confirmed that, instead of pursuing this road, the Maldives had given preference to a new strategy, consisting of becoming the first totally carbon-neutral country on the planet.⁷⁹⁴

Notwithstanding this change of policy in this Indian Ocean country, the idea was mirrored in the Pacific Ocean, as Kiribati recently initiated informal talks with Fiji on the possible purchase of land and relocation of Kiribati's entire population.⁷⁹⁵ So far, Kiribati's President Anote Tong informed the international community that the I-Kiribati government

⁷⁹⁰ In 1988, the United Nations Environment Programme released a first report on environmental refugees, at the time when the precedent on international environmental security was being dealt with in the United Nations. EL-HINNAWI, *Environmental Refugees*, 1988, (Nairobi: UNEP).

⁷⁹¹ See for instance B. DOHERTY, 'Climate Change Castaways Consider Moving to Australia', *Sydney Morning Herald Tribune*, 7 January 2012; and, from the same newspaper, B. MERCHANT, 'To Escape Rising Seas, Maldives President May Move his Entire Island Nation to Australia', 6 January 2012.

⁷⁹² On the introduction by the Maldives of the issue of climate change and human rights, see Chapter 2 above, Section 3.1.1, and Chapter 5 below (introduction).

⁷⁹³ See for instance, Ashby MONK, 'Did the Maldives Pretend to Set Up a Sovereign Wealth Fund?' 20 February 2010, available at: <<http://oxfordswfproject.com/2010/01/20/did-the-maldives-pretend-to-set-up-a-swf/>>— citing an interview with President Nasheed in which he vaguely stated: 'The fund is now formulated. We will have to save for a rainy day. And during the worst-case scenarios, as responsible politicians, we should be able to tap funds and money set aside for a rainy day. So the fund is going on, and hopefully we will have something when the going gets very bad.'

⁷⁹⁴ Costing the Earth – TheMovieChannel.com., 22 March 2009, available at: <<http://www.emailwire.com/release/20736-Costing-the-Earth-TheMovieChannelcom.html>>: 'As the Maldivian economy relies so heavily on tourism, raking in over £700,000 each year, the Government is also hoping that the carbon-neutral promise will attract more environmentally conscious tourists. The Government is working with climate energy experts to replace fossil fuels with renewable energy sources.'

⁷⁹⁵ To be financed in this case by Kiribati's Revenue Equalization Reserve Fund which has been set up with phosphate earnings over the years and acts as a stabilizer fund, created in 1956. The economy of Kiribati was heavily dependent on phosphate exports which accounted for 50% of the government's revenue.

had approved the purchase of 2,500 hectares of fertile land in Viti Levu (Fiji's main island). The land belongs to a Church which sold it for 9.6 million US dollars, and may well become a way out for the 103,000 inhabitants of Kiribati.⁷⁹⁶ Like the Banaban precedent, the two parties involved in this commercial transaction would be the State of Kiribati on the one hand, acting in a private capacity and as a private personality (and not as a State); and the Church of Fiji, which also has the status of a private personality. Thus, in principle, the purchase of the land would not involve the States of Kiribati and Fiji as such. Yet, since the land remains under Fijian sovereignty, the laws applicable in that area would remain the laws of Fiji, ruling both the public and private spheres of life (criminal law, property law, family law, etc). This situation could eventually be transformed, should there be a special agreement between Fiji and Kiribati, in which Fiji would delegate the exercise of some competences to the State of Kiribati (e.g. matters of family or criminal law, police, commercial matters resolved by customary rules, etc.). Micro-States around the world provide particularly illustrative examples of delegation of competences. The Vatican State has, for instance, delegated the exercise of police security to Italy, by virtue of the Lateran Agreement, just as the majority of Pacific Island States have done with Australia, New Zealand, the United States and the United Kingdom. Such delegation of competences implies that the authorities of a foreign country may act and intervene lawfully within the territorial boundaries of a State to restore or maintain order, though in no case is it tantamount to a delegation of sovereignty as such. Moreover, the agreements not involving a delegation of competences may simply recognize immunity from execution or even of jurisdiction over the goods and properties of the land in question – a possibility which would be subject to the transformation of the land into a public good or its purchase by the State of Kiribati in its public capacity.

In either of these scenarios, 're-territorialisation' strategies through purchase of land seems to be a limited solution to defend the continuation of a State in a total de-territorialization scenario, subject in any case to the will of the States involved in possible transactions. Although Fiji could theoretically renounce its territorial sovereignty over the 2,500 hectares of land in Viti Levu purchased by Kiribati, it is difficult to see that this will be crystallized in practice, particularly given that Viti Levu is the main island of the Fijian archipelago. The same may be said about cases of cession of territorial sovereignty by one State to another, which are theoretically possible but remain rather unlikely in practice.⁷⁹⁷ It

⁷⁹⁶ 'Una nación entera podría mudarse a Fiji', *La Voz del Mundo*, 9 March 2012.

⁷⁹⁷ Cases of cession of territory are all the more unlikely to arise in post-colonial States which have very recently acquired independence, particularly if the States at stake have already a very limited territory.

may, nonetheless, constitute a temporary solution for a partial de-territorialization scenario – as is currently developing in Kiribati, Tuvalu and the Marshall Islands. Limited population flows from geographical features most at risk could be relocated in the purchased Fijian lands (under Fijian sovereignty).⁷⁹⁸ Meanwhile, as Rosemary Rayfuse has suggested, in their struggle for survival, the country of origin of the displaced people may put in place the necessary mechanisms to fix their original maritime entitlements (by entry into force of the maritime delimitation agreements signed, or by fixing their baselines through declaration of archipelagic status), so that the relocated populations can at least benefit from the marine resources.⁷⁹⁹

4.1.2. *Merger with another State*

Given the practical and legal difficulties associated with the idea of re-territorializing disappearing States through the purchase or cession of land, some authors have also raised the possibility of merging two or more States. Putting aside the practical difficulties of making such a proposal a reality, the main remaining (theoretical) difficulty arising out of such a possibility depends on the form of political organization to be given to the new resultant political entity. If, on the one hand, the chosen form of merger is a federation or free association, the continuation of the State undergoing severe de-territorialization ought to be admissible (like the Cook Islands, having the status of a self-governing territory of New Zealand). This may not constitute a problem as long as the low-lying State remains partly de-territorialized, but it may be a difficult position to sustain once the complete submersion of the land occurs.

Only two legal fictions could sustain these forms of merger in a total de-territorialization scenario: (1) acknowledgement that one of the merged States comprises exclusively maritime territory (subject to the prior defence of the fixity of their original maritime entitlements); or (2) acknowledgement that the statehood of the submerged State continues in spite of the inexistence of any sort of spatial dimension. If neither of these legal forms is acknowledged, the merger of the States would necessarily take the form of an integration, whereby the international legal personality of one of them (presumably the State most at risk of disappearing) is subsumed in that of the other State and therefore disappears in

⁷⁹⁸ It is important to consider here only displacements of a limited number of people affected, for, as will be seen in Chapter 5 below, total de-population scenarios can arguably have the same effects as total de-territorialization scenarios.

⁷⁹⁹ R. RAYFUSE, 'International Law and Disappearing States: Utilizing Maritime Entitlements to Overcome the Statehood Dilemma', *supra*.

its former independent version (before becoming part of another State, such as New Caledonia or French Polynesia which became integrated territories of France).

4.2. De-territorialized Pacific Island States: A New Form of *Sui Generis* 'Non-State Sovereign Entity'?

4.2.1. Two Precedents of Existing Recognized Sovereign Non-State Entities: The Holy See and the Order of Malta

As explained by Sir Robert Jennings and recalled by Judge Huber, while it is widely admitted that territorial sovereignty subsists even when divorced from possession, '*excursions into the realm of an abstract title to sovereignty have been cautious and tentative*'.⁸⁰⁰ There are, nonetheless, two prominent exceptions to this principled rule, whereby sovereign entities with international legal personality have existed (and subsisted) in spite of having lost a territory specifically ascribed to the exercise of their sovereign powers. These are good examples of Brierly's remark, which stated that '*there are other elements of international law that mean these specific criteria [set up in Article 1 of the Montevideo Convention] need not be slavishly followed. It was these "other elements" that determined the inclusion of both the Holy See and the Order of Malta among the sovereign subjects of international law*'.⁸⁰¹ Drawing from these two historical precedents, tentative moves in academic circles started to suggest that the same positive fate could be endured by submerged island States.

The Holy See, supreme organ of the Catholic Church, headed by the Pope according to the Code of Canon Law, and composed of the College of Cardinals governing the Church,⁸⁰² is a non-territorial religious entity. In spite of this characteristic, inherent in its temporal nature and functions, the Holy See has known different moments in its history since the fall of the Roman Empire in which it has had a territorial basis. This situation has proven to be a fruitful source of confusion about its State or non-State nature since the inception of the modern European State, and of uncertainty, in the 20th century, about the eligibility of the Holy See for membership of the United Nations. The Holy See was first associated with the territorial extent of the Papal States, which had been created in the 9th century by Pépin le Bref and

⁸⁰⁰ JENNINGS (quoting Judge Huber), *supra*, at 5.

⁸⁰¹ BRIERLY, *supra*, at 150.

⁸⁰² Holy See is a designation under Canon Law for the highest offices of the Church + its concept has its roots in apostolic succession according to which an unbroken chain is formed of representatives of the Christ from the Apostle St Peter to the present day. See Bo J. THEUTENBERG, 'The Holy See, the Order of Malta and International Law', (2003) –open online publication, pp. 1-18, at 12; and J. L. KUNZ, 'The Status of the Holy See in International Law' (1952) *American Journal of International Law*, vol. 46, pp. 308-314.

Charlemagne (in the context of the Holy Roman Empire). Such territorial connection vanished in 1870 with the annexation by Italian troops of the Papal States, whereby the Apostolic Palaces were granted freedom (protection by Napoleon III). In spite of the annexation, the Holy See pursued its international political influence and activity, maintaining its diplomatic presence in many States and concluding treaties. This ambiguous situation lasted throughout the 19th century and even through the First World War, until, in 1929, the Lateran Agreement concluded between Italy and the Holy See established that the State of the Vatican City would fall under the sovereignty of the Supreme Pontiff, while Rome would remain under the jurisdiction of Italy.⁸⁰³ Although the Holy See reacquired territorial visibility through the institution of the Vatican City, neither of the two entities has been considered a State. The Vatican City does not exist to support, maximize the welfare, ensure the security of the Holy See nor does it respond to a legitimate right to self-determination of its 800 residents and 400 citizens (the majority of which are church officials on a non-permanent basis), for Italy provides a police force to patrol the Vatican City, administers punishment of crimes within the City, maintains the water and railways systems, as well as ensuring freedom of communications and transportation. Therefore, the Vatican City virtually acts as a 'vassal State', serving as the base for the administration of the Roman Catholic Church. To some extent, it also operates as an artificial construct that provides the Holy See with some sort of 'claim to territorial integrity', which was relevant later on to the determination of the form of the Holy See's participation in the United Nations that it was eligible for. After the initial tentative in 1944 to present the application of the State of the Vatican City for full membership of the United Nations – which failed essentially because of the principled policy of neutrality provided in Article 24 of the Lateran Treaty, the Holy See – and not the Vatican City – under Pope Paul VI, established, in 1964, a 'permanent observer' mission to the United Nations with offices in the UN headquarters.

The case of the Order of Malta differs from that of the Holy See, for it has not until now regained any territorial basis, such as that which the Vatican City to some extent provides for the Holy See.⁸⁰⁴ Currently, with 11,000 members, the Order of Malta has its headquarters in

⁸⁰³ R. AGO, 'Occupazione Bellica dell' Italia e Trattato Lateranense,' (1946) *Comunicazioni e Studi*, pp. 129ff.

⁸⁰⁴ See O. FARRAN, 'The Sovereign Order of Malta in International Law', (1954) *International and Comparative Law Quarterly*, vol. 2, pp. 217-234. For a more recent account, see K. KARSKI, 'The International Legal Status of the Sovereign Military Hospitaller Order of St John of Jerusalem, of Rhodes and of Malta', (2012) *International Community Law Review*, vol. 14, issue 1, pp. 19-32.

Via Condotti, in Rome. Therefore, in this sense, it is perhaps the best example of a contemporary de-territorialized sovereign entity. The origins of the Order date back to the 11th century when Blessed Gerard founded St John's Hospital along with other fellow Dominican monks. The Hospital was annexed to the Monastery of St John the Baptist of Jerusalem and was built up to look after the dead and wounded of the Crusades that were taking place between Christians and Muslims. The reputation of St. John's Hospital soon attracted the attention of the Pope, to the extent that, in 1113, through the *Bull Pie postulatis voluntatis*, the group headed by Blessed Gerard received official recognition as Christianity's oldest religious Order, a status which granted the Order of Malta a set of privileges, including the right to appoint its own Grand Master. After Jerusalem surrendered to the forces of Sultan Saladin in 1187, the Order moved to Cyprus (1291–1309), then to Rhodes (1309–1522) and finally to Malta, where its dominion lasted for over three centuries, until 12 June 1798, when Malta surrendered to the Napoleonic forces on board the French vessel *l'Orient*. During this long period (1530–1798) Cyprus, Rhodes and Malta provided the Order with a territorial basis, which was successively granted, as vassal States to the Order, in a political scheme akin to that of the princes or bishops of the time who were united under the Holy Roman Empire. Hence, for the five centuries during which the Order had a territorial basis, its sovereignty over such spaces was recognized by its contemporary international actors. Such historical foundations were so deeply rooted that even after the loss of Malta, its last territorial remnant, the Order was de facto treated as a *sui generis* non-State sovereign entity with international legal personality.

4.2.2. Protecting the Pacific Island Nations through the Continuation of the State: Back to the Functionalist Approach to the Role of Territory in the Configuration of Statehood

The examples of the Holy See and the Order of Malta are helpful in the sense that they point to the importance of historical contingency and context as factors which may render possible the recognition of unusual forms of sovereignty not ascribed to a territorial State entity. To be sure, their peculiar status in today's international legal and political system is undoubtedly the result of the special bond of both institutions with the long process of formation of the modern State and of the early European Law of Nations. While in the 20th century international law has undergone a process of 'universalization', its current status may be seen as a reminder of both the European origins of the international legal order and even as a reminiscence of Eurocentricism. Henceforth, simply recalling these two examples to support the cause of de-territorialized Pacific Island States and arguing that they may survive as non-

territorial sovereign entities is not, as such, particularly useful nor enlightening, since the reasons why the Holy See and the Order of Malta are recognized today as special forms of non-territorial sovereign entities cannot be applied to the case of Pacific Island States.⁸⁰⁵ Yet, these examples do help in one sense. In order to counter the historical weight represented by the two precedents of non-territorial sovereign entities and make of their example a useful tool for defending the continuation of Pacific Island States, it is essential to emphasize the functional dimension of these States at risk. Maxine Burkett's thought-provoking article has offered the grounds for a first breakthrough in this matter when arguing that Pacific Island States should survive as de-territorialized sovereign entities, for the continuation of their sovereignty would better ensure the protection of their relocated populations.⁸⁰⁶ So it is at this point that the interrelations between the territorial and the human dimensions of the State surface.

5. CONCLUSIONS

Just as the nature of the State – privileged habitat of the territory – lies outside the realm of law, the place of territory in international law is equally unsettled and its nature doubtful from a legal perspective. One way of explaining the different legal accounts of the concept of territory is by approaching it from a historical perspective and drawing from such a context the various functions that the territory has had in the international legal order. In the context of the modern European State, the territory was understood as a property of the State (property theory), an element or integral part of the State itself (constitutive theory), or the space wherein the competences of the State were displayed (competence theory). A fourth understanding of the territory concept emerges from the role it plays in Pacific Island States, for which the territory is an expression or manifestation of the right of Pacific islanders to self-determination and political independence from former colonial domination. This particular meaning, which the concept of territory has for post-colonial Pacific Island States proves that a solid normative ground may balance and even supersede the viability requirement, so that a very limited territory may be able to provide the necessary grounds for a political entity to acquire full-fledged statehood irrespective of its real capacities. Moreover, Pacific Island States' spatial dimension is not as small as it generally seems at first sight. In fact, the small extent of their

⁸⁰⁵ For we do already know of the flexibility that characterized the international legal order and its inherent capacity to adapt to its contemporary challenges.

⁸⁰⁶ M. BURKETT, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', (2011) *Climate Law*, vol. 2, issue 1, pp. 345ff.

land is largely compensated by the vast maritime spaces allocated by UNCLOS and which determines both their major spatial expression and their principal source of economic revenues. Paradoxically, for these 'ocean States', the sea is as much the fundamental element of their identity and the primary source of livelihoods, and yet also the origin of the threat to their continuation as States.

Henceforth, de-territorialization due to the adverse impacts of climate change on Pacific Island States constitutes, first and foremost, a challenge to these States' maritime entitlements. As their shorelines progressively retreat as a result of sea-level rise, baselines – generally considered as 'ambulatory' – retreat accordingly, and thus so do the outer maritime boundaries of the State concerned. Devices seeking to halt this effect would include the ratification of maritime delimitation agreements among Pacific island States and, arguably, the possibility to fix their baselines and to claim archipelagic status by fixing archipelagic lines and then refraining from updating the official charts. Less useful and more aggressive physical devices, such as the construction of sea walls, have also been taken into consideration.

And yet, as efforts seeking to freeze, preserve or protect the spatial dimension of Pacific Island States against adverse climate change impacts flourish and develop in the region, the prospects of a total de-territorialization scenario cannot be ignored or overlooked. Alternative response measures to this extreme example of climate change impact include making incursions into both re-territorialization strategies, such as the purchase of land or the eventual merger with another State, and, most prominently, the possibility to argue that completely submerged Pacific Island States may continue to be recognized as a post-modern or contemporary form of a non-State sovereign entity. The precedents of the Holy See and the Order of Malta, which currently have an atypical status, prove that there is room in international life for some flexibility on the forms of subjects allowed by the international legal system, as long as strong historical and political reasons support this special treatment. It is also a reminder that although sovereignty is the main and principal characteristic of a State, it can also exist outside a State framework. Sovereignty and statehood may therefore come together, or be set apart, if necessary, to acknowledge the existence of a special political entity that plays a role in the international community.

If the territory is a fundamental – yet not always necessary – condition for the recognition of sovereign entities, the next question that arises is: on which grounds may the continuation of Pacific islands' sovereignty and/or statehood be defended, in spite of their prospective total submergence? This question invites turning attention towards the role played by the second dimension of a State, namely, the population, as the disappearance of

the State as a sovereign political entity with international legal personality may result first from a State's total or acute de-population before total submergence ensues. The next chapter will therefore seek to show why the continuation of the State or, at least, of its sovereignty, even in extreme cases of total territorial loss, may be justified as a means of fulfilling a specific function, namely, a better protection of Pacific islanders.

CHAPTER 5

ADVERSE IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLANDERS: THE CHALLENGE OF ‘DE-POPULATION’

1. INTRODUCTION

2. COMPARING FACTUAL GROUNDS: POLICY APPROACHES TO NATIONAL AND TRANSNATIONAL CLIMATE-INDUCED RELOCATION IN PACIFIC ISLAND STATES

2.1. Regional Homogeneity of Preventive Relocation Actions

2.1.1. Common Vulnerabilities: Underdevelopment Overexposed to Climate Change Impacts

2.1.2. Common Responses: Regional Co-operation Schemes for Climate Change Adaptation

2.2. Regional Heterogeneity of Reactive Relocation Actions

2.2.1. Differing Scenarios: An Appraisal of Accomplished Relocations in the Region

2.2.2. Differential Factors: Geographical, Political and Socio-Cultural Dissimilarities of Pacific Island States

3. STRUCTURING A PROPOSAL: A MULTILAYERED LEGAL PROTECTION SCHEME FOR CLIMATE-INDUCED DISPLACEMENT IN THE PACIFIC

3.1. Existing One-dimensional Approaches to Climate-Induced Displacement: A Relevant but Incomplete Benchmark

3.1.1. Relevant Diagnosis and International Legal Regimes Analysed

3.1.2. Limited Normative and Institutional Solutions Proposed

3.2. Multidimensional Legal Protection Scheme for a Heterogeneous Factual Landscape: A New Integrative and Pluralistic Proposal

3.2.1. Widening the Spectrum: A Myriad of Potentially Applicable International Legal Regimes

3.2.2. (Re)-Introducing the Role of the State in the Configuration of a Legal Protection in Climate-Induced Relocation

4. SPECIFYING THE PROPOSAL'S LEGAL CONTENT: FRAGMENTED AND FLEXIBLE REGULATION FOR CLIMATE-INDUCED MIGRATION IN THE PACIFIC

4.1. Statehood Not at Risk: National Climate-Induced Displacements in Pacific Island States

4.1.1. Legal Framework in a Preventive Phase: Preservation of Basic Habitability Conditions

4.1.2. Legal Framework in a Reactive Phase: Recognition of Housing, Land and Property Rights

4.2. Endangered Statehood? Transnational Climate-Induced Displacements Between Pacific Island States

4.2.1. Legal Framework for Ongoing Partial De-population Scenarios: International Refugee and Migration Law, and Complementary Human rights Treaty Law

4.2.2. Legal Framework for Prospective Total De-population Scenarios: From Homelessness to Statelessness?

5. CONCLUSIONS

'It is our belief that Tuvalu, as a nation, has a right to exist forever. It is our basic human right. We are not contemplating migration. We are a proud nation with a unique culture which cannot be relocated elsewhere. We want to survive as a people and as a nation. We will survive. It is our fundamental right.'

Tuvalu's Prime Minister, H.E. Apisai
Lelemia, Poznan (Poland), UNFCCC COP.
14/MOP.4 2008)

'We don't want to lose our dignity. We're sacrificing much being displaced, in any case. We don't want to lose that, whatever dignity is left. So the last thing we want to be called is 'refugee'. We're going to be given as a matter of right something that we deserve, because they've taken away what we have.'

President of Kiribati, H.E. Anote Tong,
Tarawa (Kiribati), 12 May 2009.

1. INTRODUCTION

Just as important as the spatial dimension, the State is defined by the presence of a population within its territorial boundaries.⁸⁰⁷ While scholarly positions regarding the importance of the population for the construction of the State as a political and a cultural entity vary widely,⁸⁰⁸ State practice indicates that quantitative demographical weakness is not an obstacle to the acquisition of statehood by a political entity,⁸⁰⁹ *as long as* the presence of the population within its territory is continuous. Nowadays, as sea-level rise and coastal erosion gradually increase, the living conditions of Pacific islanders are jeopardized by the socio-economic consequences of the de-territorialization described in Chapter 4. Conceptually, the correlation between the territorial transformation of the Pacific Island States resulting from climate change impacts and the socio-economic conditions of their inhabitants can be apprehended through the concept of '*habitability*'. Borrowed from Article 121(3) of UNCLOS

⁸⁰⁷ Montevideo Convention, *supra*, Article 4(1).

⁸⁰⁸ There are indeed divergent doctrinal positions on which is the central criterion of statehood upon which all others are dependent. As already mentioned in Chapter 4, sociological approaches to the State are more inclined to view the population as the primary criterion of statehood; and thus consider the territory, afterwards, as the place where the human collectivity representing nation is located. Ultimately, preference for the population as the central criterion of statehood tends to be linked to the wider reaction against what Charles Rousseau named the '*préjugé étatique*', that is, the traditional conception of the international legal order tending to consider the State and not the individual as the primary reference object and subject of international law.

⁸⁰⁹ This is particularly shown by the proliferation of micro-states following decolonization, which tend to have populations under 1 million inhabitants, if they are not directly defined as 'micro-states' precisely because of their small population rather than because of their limited territorial extent.

and slightly adapting the description of this notion to the present purpose, the concept of habitability can be defined as the capacity of a given territory to sustain human habitation and the economic life necessary for such habitation. Since the habitability of a given space informs population behaviour and movements, such a concept is key to addressing the current issue of climate-induced displacements and relocation, also referred to by some international legal scholars as 'climate refugees'.⁸¹⁰

While this issue appears as a paradigmatic image of today's post-modern global environmental crisis,⁸¹¹ international awareness of the impact of environmental conditions in population displacements is not an entirely new phenomenon. Following the exponential normative and institutional development that international environmental law underwent since the 1972 Stockholm Conference on the Human Environment, the United Nations Environment Programme (UNEP) initiated the first study of this issue almost three decades ago. The first attempt to create a legal category of 'environmental refugees' thus dates back to the 1985 Report commonly referred to by the name of the study's Chief Director, E. El-Hinnawi.⁸¹² Following the end of the Cold War, some aspects of the El-Hinnawi Report got the chance to be developed, particularly after the publication in 1994 of the United Nations Development Programme Report on human security which incorporated as one of its pillars the need for adequate preservation of environmental conditions.⁸¹³

Finally, from the late 1990s onwards, the launch of the Climate Change and International Security Discourse set the beginning of a new stage, since studies of the effects of environmental conditions on population displacements focused on one specific environmental

⁸¹⁰ As will be developed in Part 3 of the present Chapter, definitional constraints have been encountered at the onset of the debate on this issue. The term 'displacement' alludes to the coercion felt by a group of people or animals forced to leave the place where they usually live, while the terms 'relocation' and 'resettlement' mean moving to a different place and remaining indifferent to the wished or unwished causes of such forced migration. 'Refugee' is a term that may arise after the displacement/relocation has taken place, for it deals with the status held by the person in the new relocation site when it is outside the borders of the country of origin. Aware of the difficulties to fix the 'real' subjective motivation behind the observed displacements in Pacific Island States, the terms 'displacement' and 'relocation' will be used indifferently in this Chapter, with a slight preference for the use of the term 'relocation', given that it invites taking into account the process of displacement as a whole, encompassing even the integration of the displaced people into their new habitat.

⁸¹¹ See A. GARE, *Postmodernism and the Environmental Crisis*, 1995, (London: Routledge); and L. GLOVER, *Postmodern Climate Change*, 2006, (London: Routledge).

⁸¹² E. EL-HINNAWI, *'Environmental Refugees'*, 1988, (Nairobi: UNEP).

⁸¹³ As previously pointed out, the notion of human security dates back to Basket II of the OSCE, and came back to the forefront within the United Nations with the publication of the 1994 Human Development Report, which included 'environmental security' as one of the thematic lines composing human security. See Chapter 1. Henceforth, the term 'environmental refugees' can be said to have been coined alongside the emergence of the international environmental security precedent reconstructed in Chapter 1 of this thesis.

challenge, namely, climate change. As already explained in Chapter 3 above, alongside the Climate Change and International Security Discourse, political action seeking to crystallize this move was headed by the Maldives delegation to the United Nations Human Rights Office, which, in 2007, unanimously included the issue in its the agenda under the title 'Human Rights and Climate Change'.⁸¹⁴ Yet, despite the fact that the object of study has been narrowed down to displacement situations connected to one concrete dimension of the global environmental crisis, the terms 'climate-induced displacement' or 'climate refugees' can still cover a wide range of situations. This is due to the multiple forms of the adverse impacts of climate change, which include, inter alia, severe desertification, uncontrolled river flooding, extreme weather events (cyclones, typhoons, and tsunamis), sea-level rise or coastal erosion. As a result of this wide range of climate impacts, the resulting policy and doctrinal debate on this issue of climate-induced displacement appears to be scattered, heterogeneous and disorganized.

Thus, this Chapter does not pretend to cover all situations which have been included in present studies on 'climate refugees' or 'climate-induced displacements'. Rather, the analysis undertaken here will be restricted to national and international displacements of Pacific islanders. Besides, while all displacement experiences in the region are highly valuable to introduce ourselves into the complexities of these situations, displacement cases originating in any of the three Pacific Island States most affected by de-territorialization bear capital specificity: the fate of the population is inextricably bound to the continuation of the State itself. Thus, this Chapter will focus particularly on displacements originating in the Pacific Island States most at risk – namely, Tuvalu, Kiribati, and the Marshall Islands. It is essentially argued that when establishing normative purposes (i.e. protective goals) for these specific sets of displaced populations and scrutinizing the range of legal status possible under international law to fulfil such purposes, the 'specific fact' attached to these displaced people is not only an element to be taken into account in ensuring more effective protection, but a *necessary condition* for any sort of legal protection scheme to cover the situation comprehensively. **Which are the most appropriate legal and policy responses that may ensure the protection of all climate-displaced Pacific islanders? How does the issue of the continuation of statehood raised in some Pacific Island States jeopardize the formulation of such responses?**

Most studies dealing with the issue of 'climate-induced displacement' tend to respond to similar questions by preferring one legal regime over another (e.g. international refugee law versus international human rights law); suggesting the creation of a new international

⁸¹⁴ See Chapter 2 above, Section 3.2.1

instrument specifically designed to respond to these new challenges (e.g. 'Climate Refugee Protocol' to either the UNFCCC or the Refugee Convention); or advocating a wide interpretation of the mandate of existing international organizations tasked with refugee and human rights issues. Besides, an important number of these studies become trapped in a never-ending terminological *impasse*, for instance when regarding the scope of the legal definition of 'international refugee' covered by Article 1(b) of the 1951 Refugee Convention. Truly enough, terminology is key in the realm of law, for the categorization of facts of life into legal clusters serves the association of legal consequences with each cluster.⁸¹⁵ Yet, the transformation of Pacific islanders' displacements into legal categories ought to take into account at least the following three variables: (1) whether the displacement is national or transnational (*spatial variable*); (2) whether the continuation of the State itself may be at risk as a result of transnational displacements (*contextual variable*); (3) whether either of the two previous variables is subject to change and progress over time, transforming the displacement situation itself, as well as its political consequences, into the continuation of the State (*temporal variable*). While the first of these variables is generally presented as being key, the cornerstone of the analysis and the basis for the solution proposed, the other two have been until now systematically ignored.

Therefore, the present chapter suggests approaching climate-induced displacement of Pacific islanders differently, through a methodology enabling one to grasp the diversity of this process within the region and to take into account all three variables, with particular emphasis on the contextual one. It argues that a multilayered legal protection scheme could better adapt to both present and prospective conditions of population displacement induced by climate change in the Pacific. Section 2 of this chapter begins with a comparative study of national and transnational law and policy approaches to relocation between Pacific Island States, used as factual grounds on which the proposal for a multilayered legal-protection scheme is based. Sections 3 and 4 explore this proposal through a scenario approach, which is divided into two groups by one central variable, namely, whether the continuation of the State is or is not at risk as a result of population displacements.

⁸¹⁵ This point is raised in Jane McADAM (ed.), *Climate Change Displacement: Multidisciplinary Perspectives*, 2010, (Oxford and Portland, Ore.: Hart Publishing), at 3.

2. COMPARING FACTUAL GROUNDS: POLICY APPROACHES TO NATIONAL AND TRANSNATIONAL CLIMATE-INDUCED RELOCATION IN PACIFIC ISLAND STATES

As we are commonly reminded by academics – particularly by those from the field of anthropology, but also by international legal scholars concerned with climate-induced population displacement – migration is an inherent part of the history of Mankind which has always been practised as a normal form of adaptation to the changing conditions of the ‘habitat’.⁸¹⁶ For instance, most recently, V. Boege asked about the difference between the sea-fearing Australasians who settled in South Pacific islands and used to relocate every time an atoll had become uninhabitable, centuries before Christ, and today’s inhabitants of Pacific Island States threatened by the progressive degradation of their living conditions in the same islands.⁸¹⁷ V. Boege considered that the main differences were that: (1) in the historical case, the issue was locally confined; (2) there was a direct relationship between cause and effect, for the people forced to resettle were responsible for the degradation; (3) at the time, they were not informed either of what was happening or of their implication in the degradation; and (4) today, ‘*not only is climate change a global phenomenon, but also **the discourse about it** [which] frames the thinking and talking about climate change and migration*’.⁸¹⁸ While agreeing with all these points, at least one more fundamental difference must be noted: at the time of the Australasians, the State had not yet made its appearance. Nor had it spread and settled as both the universal form of organization of collective and social life, and as a fundamental element structuring contemporary international relations.⁸¹⁹ Thus, while the phenomenon of migration may be familiar to our remote history, the tools through which Mankind responds to it are but a matter of our time and ought to be tackled with the existing instruments of the present. In other words, the continuation embedded in the role that migration has played in the different stages of our evolution becomes historically contingent when we look into the present means

⁸¹⁶ The term ‘habitat’ generally refers to the natural home or environment of a living organism, be it an animal, a plant or an individual or group of human beings. For historical-anthropological accounts on ‘environmental migration’, see, for instance, G. RICHARD, *Ailleurs, l’herbe est plus verte: histoire des migrations dans le monde*, 1996, (Paris: Arléa-Cordet); or C. PONTING, *The New Green History of the World: the Environment and the Collapse of Great Civilizations*, 2007, (New York: Penguin Books); and J. BARNETT and M. WEBBER, ‘Migration as Adaptation: Opportunities and Limits’, in J. McADAM (ed.), *supra*, pp. 57-81.

⁸¹⁷ V. BOEGE, ‘Challenges and Pitfalls of Resettlement Measures: Experiences in the Pacific Region’, (2011) *COMCAD Arbeitspapiere/Working Papers*, n° 102 (Series on Environmental Degradation and Migration), pp. 1-40, at 7.

⁸¹⁸ *Ibid.* Indeed, as seen in PART I of this thesis, it is the Climate Change and International Security Discourse that is changing the understanding not only of climate-induced migration, but also of how climate change may jeopardize the continuation of the statehood of small island States.

⁸¹⁹ On the formation of the modern European State and the differences with post-colonial island micro-states, see Chapter 4 above, Section 2.

to understand and react against it.

While migration may today still be considered as a form of adaptation, it is generally not considered as a 'desirable' reaction policy to climate change impacts. Two points support this appreciation. First of all, the Pacific is often seen and depicted in western mainstream social studies as a rather simple and homogeneous regional unit characterized by the remoteness, underdevelopment and almost insignificant power of leverage of a 'bouquet of mini-States', and there is a marked tendency to depict the whole region as being traditionally highly migratory, giving an inaccurate impression of homogeneity. Firstly, the migration rate is very high in Tonga and high in Tuvalu and Fiji; Palau and the Marshall Islands; the Federated States of Micronesia and Kiribati have a medium-low rate; while Papua New Guinea's, the Solomon Islands' and Vanuatu's rate is low to very low.⁸²⁰ Secondly, even Pacific Island States with a high or very high migration rate do not contemplate displacement (whether internal or external) as a natural and uncontroversial reaction policy. Rather, when officially taken into consideration in adaptation, development or disaster reduction plans, relocation is always considered as the solution of last resort or the 'ultimate' form of adaptation.⁸²¹ Henceforth, the following comparative analysis, which aims at illustrating the common perspectives and fundamental differences of national and transnational climate-induced relocation strategies, will be structured along the division between preventive and reactive relocation actions.⁸²²

2.1. Regional Homogeneity of Preventive Relocation Actions

2.1.1. Common Vulnerabilities: Underdevelopment Overexposed to Climate Change Impacts

'Preventive relocation actions' can be defined as the range of measures which primarily aim at *preserving* the habitability of human settlements affected by different forms of climate-related environmental stress (drought, cyclones, flooding, salt-water intrusion in agricultural

⁸²⁰ See R. BEDFORD and G. HUGO, 'Population Movement in the Pacific: Future Prospects', Labor and Immigration Research Centre, Department of Labor of the New Zealand Government (with Collaboration of the Australian Government), February 2012, full report available at: <<http://www.dol.govt.nz/publications/research/population-movement-pacific-perspective-future-prospects/04.asp>>.

⁸²¹ See, for instance, the Statement of the Global Migration Group (GMG) on the Impacts of Climate Change on Migration, adopted in Paris on 11 November 2011 by the Principals of the GMG. Document available at: <http://www.un.org/esa/population/migration/GMG%20statement_Paris_english.pdf>. The GMG is an inter-agency group binding together sixteen agencies (14 UN agencies, the World Bank and the International Organization for Migration) to promote the application of relevant international instruments relating to migration and encourage the adoption of more coherent approaches to international migration generally.

⁸²² The division between these two categories is that of the author.

lands, etc).⁸²³ The recognition of preventive relocation actions as a distinct category is not incompatible with the acknowledgement that relocation as such may take place and be considered as a possible preventive adaptation solution. Relocations as such may be integrated into preventive relocation plans and still be considered under this preventive heading: what distinguishes preventive from reactive relocation action is the *principal focus* of the respective policy under study. While most of them come from national governments, provincial and local decision-making and participation tend to be involved.⁸²⁴ Moreover, this category includes actions seeking to secure access to basic needs (food, water, and acceptable conditions of sanitation and adequate housing), as well as measures seeking to protect human settlements from material and physical destruction by climate change impacts (construction of shoreline protection, such as sea walls, protection of communication infrastructure, such as airports or roads, etc.). They are to be found in three different policy strands: climate change adaptation measures, disaster risk-reduction programmes, and development plans of the region – the latter having been transformed by the increased attention paid to the two former strands.

An overall view of the configuration of preventive relocation actions in Pacific Island States indicates that the protection of the habitability conditions of human settlements in the region is being undertaken rather homogeneously, through similar forms and aiming at analogous purposes. This trend can be explained by factors which nurture the consolidation of Pacific Island States as constitutive parts of a regional unit economically headed by Australia and New Zealand.⁸²⁵ Other than these two regional leaders, Pacific Island States are first of all characterized by their status of micro-States, which is reflected not only in their limited territorial extent, but also by primary-sector-based economies which rely on agriculture and fisheries as principal sources of income and survival of the population. The region's overall low development level is in turn connected to the equally low level of resilience and general adaptive capacity of Pacific Island States to climate change impacts. Consequently, these States embody the image of climate-related 'vulnerability', which is all the more reinforced when

⁸²³ See E. PAGE, 'Theorizing the Link between Environmental Change and Conflict', (2000) *Review of European Community and International Environmental Law*, vol. 9, issue 1, pp. 33-43, at 33.

⁸²⁴ This may be the result of the recent tendency, widespread in international environmental governance policies, to favor bottom-up approaches for their higher level of integration of the local communities and the positive consequences that such involvement may in turn generate for the effective implementation of international environmental obligations. For instance, one of the areas in which the bottom-up approach and enhancement of local participation has been developed is the implementation of REDD+ projects.

⁸²⁵ For an overview of the regional context and the role played by Australia and New Zealand in it, see Australian Strategic Policy Institute, 'Our Near Abroad: Australia and Pacific Islands Regionalism', November 2011, pp.1-84

contrasted with the overwhelming environmental challenges they are bound to face. While climate change impacts (such as coastal erosion, salt-water intrusion or drought) and climate-variability phenomena (for instance, modifications in the El Niño/La Niña phenomena, typhoons or tsunamis) provoke a range of habitat disruptions that may vary from one Pacific island State to another,⁸²⁶ their geographical continuation implies that, when a disruption occurs, all States of the region are, to some extent, affected. Given the geographical continuation, general economic weakness, and common high degree of exposure to climate change impacts, Pacific Island States have chosen similar policy strategies to prevent the further degradation or destruction of the habitability conditions of their respective territories by climate-related challenges. Yet, the crucial factor that promotes the homogeneous or similar approach to preventive relocation actions is the important degree of intraregional co-operation on these matters which, as developed below, can be found in climate change adaptation actions, disaster risk-reduction programmes, and development plans of the countries at stake.

Adaptation was recognized as an important part of the international regime on climate change ever since its inception.⁸²⁷ Yet, it is equally acknowledged that such a part was, as F. Yamin and J. Depledge point out, '*flawed with problems*'.⁸²⁸ While the global nature of climate change invited a global solution and gave impulse to a process of international co-operation seeking to involve as many States as possible,⁸²⁹ the inherently local (or, at best, regional)

⁸²⁶ Detailed study on the climate change impacts suffered by each Pacific island State and territories has been conducted by the Applied Geo-science and Technology Division of the Secretariat of the Pacific Community (SOPAC) under the South Pacific Sea Level Rise and Climate Monitoring Project. Country reports can be found at: <<http://www.sopac.org/index.php/south-pacific-sea-level-a-climate-change-monitoring>>

⁸²⁷ As such, climate change adaptation thus appears in several Articles of the UNFCCC. Article 4(1) first indicates that '*the Convention commits countries to prepare for and facilitate adequate adaptation to climate change*'; then Article 4(4) explicitly states that '*developed countries are required to assist developing countries in meeting costs of adaptation to the adverse effects of climate change*'. Article 4(8) continues, stating that '*all Parties are required to take the actions necessary related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing countries arising from the adverse effects of climate change*', and is completed by Article 4(9), which specifies that, in doing so, countries commit themselves '*to take full account of the specific needs and special situations of the least-developed countries in their actions with regard to funding and transfer of technology*'.

⁸²⁸ F. YAMIN and J. DEPLEDGE, *The International Regime on Climate Change: A Guide to Rules, Procedures and Institutions*, 2005, (Cambridge, UK: Cambridge University Press), Chapter 8, p. 213.

⁸²⁹ The move to wide multilateralism or even universalism in international environmental co-operation particularly spread after the 1972 Stockholm Conference on Environment and Development. As explained by Dan Sarooshi, this move to universalism was sought not only because it would benefit the primary goal of environmental protection of 'common goods', but also signified the crystallization of a 'pact' between industrialized countries and the newly decolonized developing countries willing to begin their own development through an industrialization process. D. SAROOSHI, *The Art and Craft of International Environmental Agreements*, 2011, (Cambridge, Mass.: Harvard University Press). Recent

nature of adaptation measures became an important obstacle to securing adaptation funding in the earlier stages of existence of the regime.⁸³⁰ Besides, the confusion (deliberately sought by OPEC countries) between adaptation to climate change impacts and 'response measures' – namely, negative economic side-effects of mitigation actions on the oil-exporting industry – also contributed to the prevention of an exponential development of adaptation under the UNFCCC regime.⁸³¹ Notwithstanding the former difficulties, the latest period of the climate change negotiations (particularly from the 2007 Bali Road Plan onwards) has been marked by an increasing attention to the role and importance of adaptation. As the structural impasse of the current climate change negotiations on the second commitment period of the Kyoto Protocol for the post-2012 period remains unsolved, the original focus on gathering concerted mitigation action seems to be shifting in favour of developing the operability conditions of adaptation measures. Thus, following the establishment of the Adaptation Fund and the launch of the Nairobi work programme 'Understanding Vulnerability, Fostering Adaptation', the latest landmark of this trend can be found in the adoption in Cancún (Mexico) of the 2010 Climate Adaptation Framework.⁸³²

As the dynamic fostering adaptation gradually takes off, the most vulnerable State Parties began setting the basis for common (regional) approaches to climate change adaptation and understanding of vulnerability. The UNFCCC Expert Meeting on Climate Change Adaptation for Small Island Developing States, celebrated in Rarotonga (Cook Islands) in February 2007 is a

voices against the use by developing countries of their power of leverage in international environmental agreements, such as the UNFCCC, to foster their developmental goals (that is, against the idea that a climate change regime should include redistribution as a purpose) claim the need for a more pragmatic approach to environmental protection. These voices include followers of the Law and Economics movement, such as most prominently E. POSNER and D. WEISBACH, *Climate Change Justice*, 2010, (Princeton, N.J.: Princeton University Press). See *contra*, for instance, F. SOLTAU, *Fairness in International Climate Change Law and Policy*, 2009 (Cambridge, UK: Cambridge University Press); and, more specifically concerned with fairness claims of developing countries in international environmental negotiations, K. MICKELSON, 'South, North, International Environmental Law and International Environmental Lawyers?', (2000) *Yearbook of International Environmental Law*, vol. 11, pp. 52-81.

⁸³⁰ For instance, the financial assistance provided by the Global Environmental Facility could only cover the 'incremental costs' of a project (e.g. the costs of implementation (mitigation) measures which produce a 'universal benefit'). In F. YAMIN and J. DEPLEDGE, *supra*.

⁸³¹ Article 4.8 of UNFCCC alludes to the objective of responding to the adverse effects of climate change in conjunction with addressing the impacts stemming from the implementation of response measures, which generally refers to negative side effects resulting from the implementation of climate change mitigation activities.

⁸³² UNFCCC State Parties adopted the Cancun Adaptation Framework (CAF) as part of the Cancun Agreements, adopted in Cancún, Mexico, on the occasion of the celebration of the COP 16/CMP 6. In the Agreements, Parties affirmed that adaptation must be addressed with the same level of priority as mitigation. The CAF is the result of three years of negotiations on adaptation under the Ad hoc Working Group on Long-Term Co-operative Action (AWG-LCA) that had followed the adoption of the 2007 Bali Roadmap.

good illustration of the grounds on which a homogeneous approach to preventive relocation actions in Pacific Island States was based. As a result of the positive development of adaptation funding, coupled with the development of regionally concerted co-operation on this matter, all adaptation strategies of Pacific Island States are – unsurprisingly – linked to the UNFCCC process.

First of all, approaches to preventive relocation actions are particularly similar in the least developed countries (LDCs) of the region that qualify for funding of National Appropriate Plans of Action (NAPAs) of the region. Since the adoption of the UNFCCC, NAPAs were intended to be a way for least developed countries to identify their most urgent adaptation needs which would be funded and implemented as a priority.⁸³³ Today, the five LDCs of the Pacific region which qualify for this funding category have submitted their respective NAPAs – Samoa (2005), Kiribati (2007), Tuvalu (2007), Vanuatu (2007) and the Solomon Islands (2008) – and are now starting their implementation.⁸³⁴ The greater level of homogeneity in the approach to the configuration of preventive relocation actions through NAPAs is essentially derived from the common institutional framework in which these plans are developed. All qualified countries are advised by the same board of experts (LEG),⁸³⁵ which guides them through the same vulnerability assessment guidelines and encourages participation at the grass-roots and community levels in the elaboration of NAPAs.⁸³⁶ The priority areas identified by the five LDCs of the region focus on securing access to basic needs (in particular, water) and improved sanitation (Kiribati). Most interestingly, only two of the Pacific counterparts (Samoa and Tuvalu)

⁸³³ Besides, States Parties that qualify as LDCs are financially supported to develop their plans of action.

⁸³⁴ Samoa, 'National Adaptation Programme for Action', 2005, Ministry of Natural Resources, Environment and Meteorology. See Tuvalu's National Adaptation Programme for Action, May 2007, Ministry of Resources, Environment, Agriculture and Lands, Department of Environment; Republic of Vanuatu, National Adaptation Programme for Action (NAPA), 2007, National Advisory Committee on Climate Change; Solomon Islands, 'National Adaptation Programme for Action', November 2008, Ministry of Environment, Conservation and Meteorology; and Republic of Kiribati, 'National Adaptation Programme for Action', 2007, Ministry of Environment and Social Development.

⁸³⁵ The Least-Developed Countries Expert Group (LEG), nominated by the Parties, was established at the 7th UNFCCC Conference of the Parties, with the objective of supporting the preparation and implementation strategy of national adaptation programmes of action. Then, at the 16th session of the COP, they reviewed the progress of the work, and the terms of reference of the expert group were reviewed, and the group's mandate extended for another five years. Detailed information on the LEG is available at:

<http://unfccc.int/cooperation_support/least_developed_countries_portal/ldc_expert_group/items/4727.php>

⁸³⁶ Since its establishment in 2001, the LEG has prepared various documents and publications, including the LEG annotations to the NAPA guidelines and the step-by-step guide for implementing NAPAs. See in particular, 'Annotated Guidelines for the Preparation of NAPAs', 2002, (Bonn: UNFCCC Secretariat), doc. Reference FCCC/PRT/202 B, available at:

<http://unfccc.int/essential_background/library/items/3599.php?such=j&symbol=FCCC/PRT/202%20B#beg>.

make reference to the protection of settlements themselves and the possibility of relocation as part of the set of adaptation strategies. Neither of these two NAPAs addresses the issue of relocation as a key priority area in itself. On the one hand, Tuvalu's Plan simply mentions relocation/resettlement as a situation which should possibly be taken into account during the implementation of a key priority area.⁸³⁷ On the other, Samoa's approach goes a bit further; while it also considers the protection of human settlements as one of the issues which may need to be dealt with in order to secure the effectiveness of another priority area, it nonetheless suggests that such protection may be achieved through, inter alia, the construction of artificial islands.⁸³⁸ Yet, even Samoa's plan falls short when compared with the place that relocation was given in the NAPA of the Maldives, which, as a whole, was centred on the 'Safer Island' project which openly and directly seeks to address the issue of relocation of human settlements as a key priority area.⁸³⁹

2.1.2. Common Responses: Regional Co-operation Schemes for Climate Change Adaptation

Other than the special bond and similar approaches to preventive relocation actions which are found in the five States Parties that qualify for NAPA funding, all thirteen Pacific Island States have a regional approach to climate change adaptation (into which the five NAPAs may be inserted). This common 'background' essentially results from the creation of the Pacific Adaptation to Climate Change Project (PACC), funded by the Global Environment Facility (GEF) along with the co-operation aid agencies of Australia (AusAid) and the United States of America (USAID) and with support of the C3D+ programme of UNITAR which aims at developing climate change adaptation and capacity-building.⁸⁴⁰ The project covers activities from 2009 to 2013 and is structured along three key lines that 'build resilience' to climate change in Pacific island States. Food production and food security is the focus of Fiji, Palau, Papua New Guinea and the Solomon Islands; coastal-management capacity is followed by the Cook Islands, the Federated

⁸³⁷ Tuvalu's NAPA, *supra*.

⁸³⁸ Samoa, NAPA, *supra*.

⁸³⁹ See Republic of Maldives, 'National Adaptation Programme of Action, Ministry of Environment, Energy and Water', December 2006. Among the actions planned in Maldives' NAPA, the so-called 'Safer Island Project' is particularly noteworthy, at 40ff.

⁸⁴⁰ As explained in the official website of the Pacific Adaptation Climate Change Project, the C3D+ project is supported by a grant from the European Commission and is part of the larger "Capacity Development for Adaptation to Climate Change and GHG Mitigation" project. The C3D+ thus includes, as partner institutions collaborating with SPREP: the International Institute for Sustainable Development (IISD), the Stockholm Environmental Institute (SEI), Climate System Analysis Group (CSAG), Munasinghe Institute for Sustainable Development (MIND). The C3D+ SPREP component is part of the larger "Capacity Development for Adaptation to Climate Change and GHG Mitigation" project.

States of Micronesia, Samoa (Tokelau) and Vanuatu; and strengthening water resource management is the area of development stressed by Nauru, the Marshall Islands, Tonga, Tuvalu (and New Zealand's territory of Niue). Additional funding provided by AusAid and USAID will enable Kiribati to become an additional participant in the PACC. One of the most important characteristics of the Project is the clear objective of mainstreaming the adaptation measures to climate change and climate variability in key development sectors.⁸⁴¹ This connection, in tune with the previously adopted 2008 Niue Declaration on Climate Change, is bluntly indicated in the main internet portal of PACC, which defines the Project as being '*designed to promote climate change adaptation as a key prerequisite to sustainable development in Pacific Island Countries*'.⁸⁴² The United Nations Development Programme is thus one of the implementing agencies of the Project, working in partnership with the Secretariat of the South Pacific Region Environment Programme (SPREP).

Moreover, the homogeneous approach to preventive relocation actions is also facilitated by the presence of the South Pacific Regional Environment Programme (SPREP) which, working in partnership with UNDP, was appointed by Pacific islands Heads of State as the leading co-ordination agency of the region's response to climate change impacts. To fulfil this function, SPREP works through three multi-stakeholder co-operation channels: the Pacific Climate Change Roundtable,⁸⁴³ the Pacific Islands Framework for Action on Climate Change⁸⁴⁴ and the Council of Regional Organizations of the Pacific (CROP) CEOs Working Group on Climate Change. The Secretariat conducts the development of guidelines and best practices to support Pacific Island States in planning and implementing national adaptation strategies, as well as to foster the mainstreaming process. While the forms or schemes of implementation may vary because the stakeholders involved in each country differ (ministries, etc), the majority of national adaptation plans in Pacific Island States do not include relocation plans.

Finally, the way of dealing with preventive relocation actions in the Pacific is, in addition, characterized by the association of climate change adaptation and development

⁸⁴¹ Mainstreaming is generally understood as the action of incorporating adaptation to climate change risks and related vulnerabilities into existing institutional and decision-making processes, both at the community level and the national planning level.

⁸⁴² Information extracted from the official website of the Pacific Adaptation to Climate Change Project conducted through SPREP, available at: <<http://www.sprep.org/pacc-home>>.

⁸⁴³ The Pacific Climate Change Roundtable (PCCR) is a regional climate change forum hosted by SPREP and held once every two years. For more information on past and future roundtables, see the official portal of the PCCR, available at: <<http://www.sprep.org/pacific-climate-change-roundtable/pccrhomepage>>.

⁸⁴⁴ See the 'Pacific Islands Framework for Action on Climate Change (2006–2015)', 2nd ed., reprinted 2011 (Apia, Samoa: SPREP), which timeframe builds on the previous 'Pacific Islands Framework for Action on Climate Change, Climate Variability and Sea-Level Rise (2000–2004)'.

programmes with Disaster Risk Reduction Plans, a third sector which has progressed a lot (and rather autonomously) during the past decade, particularly since the adoption of the 2005 Hyogo Framework for Action.⁸⁴⁵ The recognition of the necessity to link these sectors in the Pacific was fostered after the 2007 tsunami hit the whole region. The traumatic and destructive force of this phenomenon blatantly reminded everyone that many of the disasters experienced in this region are associated with climate-variability phenomena that will be exacerbated by climate change, such as increase in storm number and frequency; changes in cyclone direction and increase in their destructive force; longer periods of drought; or more acute and uncontrolled floods. The link between climate change adaptation, development plans and disaster risk reduction is thus crystallized in the design of Joint National Action Plans (JNAPs) which result in inter-State co-operation among these three sectors and seek to reduce duplication of effort and make more efficient use of already scarce resources.⁸⁴⁶ Tonga has already finished its JNAP and is starting the implementation phase of its pilot projects;⁸⁴⁷ the Marshall Islands and the Cook Islands plans are close to completion, and Tuvalu and Nauru are also currently developing their plans.

2.2. Regional Heterogeneity of Reactive Relocation Actions

2.2.1. Differing Scenarios: An Appraisal of Accomplished Relocations in the Region

'Reactive relocation actions' may be understood as the range of measures primarily

⁸⁴⁵ On the occasion of the World Conference on Disaster Reduction, held in Kobe, Hyogo (Japan), in January 2005, the 'Hyogo Declaration' and the 'Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters' were adopted. The Hyogo Framework for Action tasked the United Nations Office for Disaster Risk Reduction – established in 1999 after the adoption by the General Assembly of the International Strategy for Disaster Reduction (UNISDR) – with support for the implementation of the Framework for Action.

⁸⁴⁶ See SPREP–JNAPs website, available at: <<http://www.sprep.org/Adaptation/current-programmes>>. The current JNAP process has regional organizations working side by side with national governments to support them in this process. A joint partnership exists between SPREP, SPC (SOPAC Division) and UNDP, which has been supported through bilateral assistance from governments such as Australia's.

⁸⁴⁷ See Joint National Action Plan on Climate Change Adaptation and Disaster Risk Reduction (2011–2015), Second National Communication Project, July 2010, Ministry of Environment and Climate Change and National Emergency Management Office, Tonga. Tonga's JNAP was financed by the Global Environment Facility through the United Nations Development Programme, the ACP–EU Natural Disaster Facility through the South Pacific Applied Geoscience Commission (SOPAC) and the Secretariat of the South Pacific Regional Environment Programme (SPREP). The JNAP focused on three main areas of action: (1) building and enhancing institutional capacity to mainstream climate change resilience into national development programs, sectoral legislation and governmental policies (including for ministries with responsibilities for the provision of infrastructure); (2) strengthening civil society, community and private-sector engagement and enhance consideration of gender issues to support climate change resilience-building; and (3) design the Strategic Programme for Climate Resilience (SPCR) on the importance of climate-resilience planning responses. Find info on the relocation village.

dealing with relocations *per se*. Although some of these measures may be launched before the relocation actually takes place, they are nonetheless considered in this section as 'reactive' and not 'preventive,' for, instead of being focused on preserving the habitability of human settlement generally, they operate within a context or plan which is centred on an ongoing and specific relocation of individuals or a community. The category of 'reactive relocation actions' thus includes the preparation of a relocation plan, its implementation, as well as the *ex-post* measures directed at the creation and maintenance of the habitability of the new relocation area.

The study of reactive relocation actions in the Pacific is undertaken in this section and is summarized in Table 4, below, in which they are considered both from a factual and a policy perspective. First of all, the Table aims at identifying whether and when relocations have already taken place in and between Pacific Island States, the number of people involved, the places of origin and resettlement and, most importantly, whether the relocation involved autonomous individuals, family units or the displacement of entire villages at a time. The Table then goes on to focus on the policy and legal aspects of accomplished relocations. It thus begins by identifying the existence of a relocation 'plan' – or lack thereof – and (in the affirmative) indicates the actors involved in it. The existence of a 'plan' may include negotiations of national land tenure agreements or new overseas migration agreements that are capital to secure a right to housing in the relocation area. The Table also pays attention to the level of participation of the people involved in the preparation or implementation of the relocation, distinguishing three different scenarios: (1) cases where the plan emerged from national or regional authorities with little or no participation of local actors (top-down approach); (2) cases where the plan is produced by the local communities themselves, which then try to convince regional or national authorities to support the plan politically and financially (bottom-up approach); and (3) cases where the plan results from co-operation amongst the different relevant levels of governance that is generally headed by the national government (mixed approach). Finally, the Table takes account of the range of relocation funding strategies, where the presence of international actors (States' external aid programmes, and foreign non-State institutions like NGOs, foundations, etc.) can be measured against that of governmental authorities (national, provincial and local) and of local community actors (Churches, Council of Elders, private donations, etc.).

TABLE 4. Accomplished Climate-Induced Relocations in Small Pacific Island States

| | CLIMATE-INDUCED RELOCATIONS IN SMALL PACIFIC ISLAND STATES | | | | | | | |
|-----------------|--|---|----------------------|---|---|--|--|---|
| | Relocation Data | | | | | Relocation Planning | | |
| | Year | Type | Number of People | Place(s) of Origin | Place(s) of Relocation | Instrument(s) and/or Actions | Approach and Actors Involved | Funding |
| FSM | NO CLIMATE-INDUCED RELOCATIONS DOCUMENTED | | | | | | | |
| Fiji | 2007 | National Planned Village Relocation | 150 | Shoreline Village of Vunidogoloa (Vanua Levu Island) | Higher Land Baptised 'Kenani' – The Promised Land- (Vanua Levu Island) | No formal instrument available | INTEGRATED *Local Communities *Ministry of Provincial Development *National Disaster Management Office *Ministry of Local Government, Urban Development, Housing and Environment | Governmental Assistance (water tanks) |
| Kiribati | Regular Basis | National 'Spontaneous' Individual/Family Relocation | X | Outer islands (e.g. southernmost Betio Atoll) (Gilbert Islands) | Tarawa (Kiribati's capital, Gilbert Islands) | Kiribati Adaptation Program Pilot Investment Phase KAPIII, <u>Lands Acquisition and Resettlement Policy Framework</u> (2011) | TOP DOWN *Ministry of Environment, Lands and Agricultural Development (MELAD) *'Resettlement Committee' | World Bank, GEF, UNDP, Japan PHRD Climate Change Fund |
| | Since 2002 | Overseas Planned Individual Relocation | 75 citizens per year | Kiribati | New Zealand | <u>New Zealand Pacific Access Category</u> | TOP DOWN *Government of Kiribati *Government of New Zealand | X |

| | | | | | | | | |
|-------------------------|--|--|------------------------------|----------------------|--|--|--|---|
| | Since 2007 | Overseas Planned Individual Relocation | 50 people currently enrolled | Kiribati | Australia | <u>Kiribati-Australia Nursing Initiative</u> | TOP DOWN *Government of Kiribati *Government of Australia | X |
| | Not yet | Overseas Planned Families Relocation | 500 families | Kiribati | Vanua Levu Island (Fiji) | No official Agreement. Informal talks on the possibility to purchase land (since 2012) | TOP DOWN * Government of Kiribati * Private Fijian land owner | Kiribati's Revenue Equalization Reserve Fund (phosphate earnings) |
| Marshall Is. | NO CLIMATE-INDUCED RELOCATIONS DOCUMENTED | | | | | | | |
| Nauru | NO CLIMATE-INDUCED RELOCATIONS DOCUMENTED | | | | | | | |
| Palau | NO CLIMATED-INDUCED RELOCATIONS DOCUMENTED | | | | | | | |
| Papua New Guinea | 2001 | National Planned Village Relocation | 1000 | Duke of York Islands | New Britain Island | X | X | East New Britain Provincial Government (provided emergency supplies and purchased resettlement land) |
| | 2005 | National Planned Village Relocation | 1750 | Carteret Islands | Bougainville main island (Tinputz, Tearouki and Mabiri host communities) | <u>Carteret Integration Relocation Plan</u> | BOTTOM UP *Tulele Peisa (local NGO) *Council of Elders *Autonomous Region of Bougainville Regional Government *PNG National Government | Catholic Church, NGOs, PNG National Government |

| | | | | | | | | |
|----------------------------|------------------|---|-------------------------|--|--------------------------------|--|---|--|
| Samoa | 2010 | National 'Spontaneous' Village Relocation | X | Fagamalo Settlement | Higher land | No official Relocation Plan | BOTTOM UP | Congregational Christian Church of Samoa (water tanks donation) |
| Solomon Islands | 2012 | National 'Spontaneous' Village Relocation | X | Ava village and North Vella Lavella | Giza Island | No official Relocation Plan | BOTTOM UP *Led by Chiefs of Communities | X |
| Tonga | 2012 | X | X | X | X | <u>Joint Implementation Adaptation and Disaster Risk Reduction Plan</u> Pilot Project | MIXED | X |
| Tuvalu | Regular Basis | National 'Spontaneous' Individual/Famil y Relocation | X | Outer islands (Unspecified location) | Funafuti (Tuvalu's capital) | X | X | X |
| | Since 2002 | Overseas Planned Individual Migration | 75 citizens per year | Tuvalu | New Zealand (Auckland) | <u>New Zealand Pacific Access Category</u> | TOP DOWN *Government of Tuvalu *Government of New Zealand | |
| | Not yet | Overseas Planned Community Migration | X | Tuvalu | Australia | <u>Formal Request to Australian Government (2008)</u> – denied but followed by Informal Positive Response of Australia Torres Straits Inhabitants | MIXED | X |

| | | | | | | | | |
|----------------|------|---|-------------|---------------------------------------|-------------|---|---|--|
| Vanuatu | 2005 | National Planned Village Relocation | 300 approx. | Lateu Settlement (Tegua Island) | Higher land | <u>Lateu Community Relocation Project Implementation Plan</u> | <p>INTEGRATED</p> <p>*South Pacific Regional Environment Programme (SPREP)</p> <p>* National Advisory Committee on Climate Change (NACCC)</p> <p>* Consultations with Local Communities</p> | <p>*Canadian International Development Agency</p> <p>*NGOs</p> <p>*Church of Melanesia</p> <p>*NACCC</p> |
|----------------|------|---|-------------|---------------------------------------|-------------|---|---|--|

Source: Personal Elaboration based on Official and Media Information Listed in the Bibliography

Before embarking on a comment on the information in Table 4, it is important to highlight a few preliminary observations. To begin with, the Table is only concerned with climate-induced relocations, that is, those which can be understood as an ultimate form of adaptation to the climate change impacts or to climate variation. In this sense, it can be seen as an open reaction against scholarly tendencies which depict Pacific islanders as belonging to a region familiar with and traditionally open to migration, and support such description by recalling three past forced displacement episodes. Thus, one can often find references to the relocation that followed the devastating environmental effects of nuclear testing undertaken by the United States Department of Defense in the northern part of the Marshall Islands. Kwalajei atoll was eventually fully evacuated and most of its inhabitants resettled in Majuro, the main atoll and capital city of the archipelagic State. The relocation of the Nauruans and of Banabans (Kiribati) to the island of Rabi (Fiji), who were forcibly expelled by former colonial and administering powers wishing to exploit phosphate mining resources, are the two other often cited examples. This tendency can be criticized from two angles. First of all, using past abuses committed by foreign powers before Pacific islands' independence to support the present appreciation of a regional migratory behaviour is – to say the least – controversial, if not totally ill-considered. While past forcible displacement and present climate-induced relocations share the same typology of 'victims' and are a consequence of external actors' harmful actions or behaviour, each situation should nonetheless be correctly (re)contextualized. Having said so, it also seems important to pay closer attention to the inequalities of present regional migration rates and introduce some qualifications of the generalized view that the Pacific is, still today, a highly permeable space of constant human circulation.⁸⁴⁸

The second preliminary observation on the constitution of Table 4 above is that it has only been possible to find documentation about relocation cases in nine out of twelve Pacific Island States. While the existence of climate-induced relocation episodes in Palau, Federated States of Micronesia and the Marshall Islands was mentioned in an official statement by the Micronesian President before the United Nations, no other documents on this subject have been obtainable – perhaps because of linguistic limitations. Nonetheless, the information found about the remaining States and displayed in Table 4 evidence adequately the existence of fundamental factual and policy differences in respect of climate-induced relocation within the region.

⁸⁴⁸ The highest migration rates can be found in Tonga (very high), Tuvalu and Fiji (high); Palau and the Marshall Islands have medium levels, followed by the Federated States of Micronesia and Kiribati (medium-low). Finally, Papua New Guinea, the Solomon Islands and Vanuatu have low overseas migration rates.

As the Table shows, most climate-induced relocations which have been documented as such in Pacific Island States have taken place within State boundaries. Only Tuvalu, Kiribati and Tonga may be said to be officially embarking on projections of overseas (climate-induced) relocation of their population. The main instrument serving the purpose of permanent relocation of Tuvaluans, I-Kiribati and Tongan islanders is the Pacific Access Category. Under this immigration agreement concluded by these three countries with New Zealand in 2002, up to 650 people can annually be granted permanent residence and working permits in New Zealand, with special quotas being reserved for 75 Tuvaluans, 75 I-Kiribati and 250 Tonga islanders. Although the quotas cover not only primary but also secondary applicants, such as spouses and dependent children under 25 years old, the demanding eligibility conditions for primary applicants initially reduced the impact of this new immigration provision. Apart from having to have a fair understanding of the English language, as well as a job offer in New Zealand, primary applicants were required to demonstrate good health as well as a sound character. Given that, initially, the quotas were not filled, these conditions were relaxed after 2005.⁸⁴⁹ The Pacific Access Category provides a stable framework of migration which undoubtedly facilitates the creation of islanders' communities in New Zealand which can promote their integration into the 'host' country.⁸⁵⁰ Besides, its adoption seemingly marked the beginning of a dynamic and engaging stage. Following the Pacific Access Category, the two regional powers continued opening up to their Pacific island neighbours through three new immigration agreements. In 2007, Australia and Kiribati agreed on the Nursing Initiative, an immigration and capacity-building framework '*created to enhance Kiribati's ability to cope with overpopulation and climate change by educating Kiribati youth and gain Australian and international employment in the nursing sector*'.⁸⁵¹ The same year, New Zealand launched the Recognized Seasonal Employer Policy, allowing the temporary entry of workers into the horticulture and viticulture industries, with a preference for people from Pacific island

⁸⁴⁹ N. SBRAMANIA, 'Pacific Islands Immigration Provisions', 2011, Center for Climate Change Law.

⁸⁵⁰ See F. GEMENNE and S. SHEN, 'Environmental Change and Forced Migration Scenarios (EACH-FOR): Tuvalu and New Zealand Case Study', 2008, pp. 1-32, (paper resulting from a research project financed by the European Commission, available at: <www.each-for.eu>). See also M. LOUGHRY and J. McADAM, 'Kiribati: Relocation and Adaptation' (October 2008) *Forced Migration Review*, vol. 31, pp. 51-52.

⁸⁵¹ N. SBRAMANIA, *supra*. This is a five-year pilot programme sponsored by AusAid (Australian official co-operation agency), which takes place at Griffith University. It requires an undergraduate student to attend a four-month preparation in Kiribati, followed by another four months of nursing-diploma preparation at Griffith University in Australia, and then to complete a nursing diploma before starting a bachelor degree in nursing. Eighty students are currently enrolled in this programme.

countries (except Fiji).⁸⁵² This policy was reproduced two years later by Australia with the 2009 Pacific Seasonal Worker Scheme, created for the purpose of *'encouraging Pacific island workers to contribute to the economic development of their home countries through remittances'*.⁸⁵³

While the unprecedented high level of overseas immigration from Kiribati, Tuvalu and Tonga to Australia and New Zealand is undeniable, the question of whether any of these new immigration schemes can be considered as responses to climate change impacts instead of regular economic migration is very controversial. Interestingly, Kiribati and Tuvalu are both direct beneficiaries of the permanent immigration scheme agreed with New Zealand, and yet each has shown radically opposed official approaches to this issue. On the one hand, the government of Kiribati openly considers it necessary to include overseas relocation as an important element of Kiribati's climate change adaptation programme. While the level of consciousness of the I-Kiribati population regarding the medium- and long-term effects of climate change impacts for their country is uneven and rather uncertain,⁸⁵⁴ the opinion of President Anote Tong is quite straightforward, as he contends that *'we can never be too well prepared for the effects of climate change (...) If circumstances force the migration of our people to other nations at some future date, we want them to go there not as climate change refugees but as people who are equipped to contribute meaningfully to their host nations' economies.'* Hence, not only does he use the term 'climate refugees', but even considers it a duty of the regional leaders to the people they govern to prepare them for worst-case scenarios. The most recent governmental external policy action was the initiation of informal talks with a private land owner of Fiji's Vanua Levu island on the possibility to purchase 22.2 sq. km. of land. The early conversations between the two Parties were facilitated by Fiji's Real Estate Agents Licensing Board, according to which, the purchase would be followed by the implementation of a development plan which would include the settlement of around 500 I-

⁸⁵² *Ibid.* This visa is valid for up to seven months in an eleven-month period and is only granted in case of a clear need for additional seasonal workers. It allows employers to recruit non-New Zealand citizens or resident workers. Since 2009, up to 8000 Pacific islanders have worked under this policy, coming from Kiribati, Samoa, Tonga, Tuvalu, Vanuatu, the Marshall Islands and Palau.

⁸⁵³ *Ibid.* Up to 2500 visas granted over a period of 3 years to workers from Kiribati, Papua New Guinea, Tonga and Vanuatu. For the horticultural industry, the need has to be proven by the employer. The visas were issued for periods of up to 7 months in any 12-month period, and did not allow dependents to benefit from it. The first phase, which lasted until February 2010, was used by 50 Tongan and 6 Vanuatu workers. Due to the lack of demand for workers, 44 of 100 visas were unused.

⁸⁵⁴ For instance, Harry Tong, brother of current Kiribati President Anote Tong and leader of the opposition, stated that the islands can never sink because his church believes that *'God promised Noah there would not be another flood after the last one.'* Michael McKenzie, Vicar-General of the Diocese of Tarawa and Nauru, qualified this position by responding that *'God's promise is, of course, valid. But this sea-level rise has man-made causes and God has nothing to do with it.'*

Kiribati families and the production of food products, as well as some materials for construction of shoreline protection and sea walls, to export to their home country.⁸⁵⁵ Moreover, this openly embracing climate-induced relocation policy also had manifestations at the national level, as epitomized by the preparation, in 2011, of a Land Acquisition and Resettlement Policy Framework as part of the third phase of the Kiribati Adaptation Project. This policy framework – supported by international funding institutions (World Bank, the Global Environmental Facility, the Japan PHRD Climate Change Fund and the UNDP – was launched out of the acknowledgment that *'some of the activities involved in the implementation of MOPs and/or Pilot Island Adaptations might require land acquisition and/or resettlement of the vulnerable communities to climate change and sea level rise'*.⁸⁵⁶

On the other hand, regardless of what the real intentions of Tuvalu's governmental actions – such as the negotiation of the conditions of the Pacific Access Category – the official position of this country contrasts with that of Kiribati and tends to be much more reluctant to acknowledge the need of overseas climate-induced relocation planning. Ever since the possibility of relocating the whole population to the Fijian island of Kioa was raised in 2006 by a Tuvaluan-born Australian climate change campaigner,⁸⁵⁷ the successive governments seemed to have maintained the position expressed by Prime Minister Maatia Toafa in power at the time. Back then, M. Toafa stated that relocation was *'not a priority'* and that his government did not regard rising sea levels as being such a threat that the entire population would need to be evacuated.⁸⁵⁸ This initial position of apparent denial has now evolved into one of patent resistance. Whilst Kiribati's approach may be more pragmatic, Tuvalu does not resign itself to the idea that the fate of future Tuvaluan generations may have to be found outside of the nine atolls that acquired political independence in the late 1970s. The citation, at the beginning of the present chapter, of the current Prime Minister of Tuvalu, Apisai Lelemia, clearly transmits

⁸⁵⁵ See, for instance, 'Kiribati Mulls Fiji Land Purchase in Battle against the Sea', BBC News, 12 March 2011, available at: <<http://www.bbc.co.uk/news/world-asia-17295862>>.

⁸⁵⁶ See Kiribati Land Acquisition and Resettlement Policy Framework, 2005 (amended 2011), at 8. In particular, the Resettlement Committee was established by the GOK to deal with the resettlement of the atolls of Teraina, Tabuaeran and Kiritimati, *Ibid.*, at 10.

⁸⁵⁷ Don Kennedy, retired scientist born in Tuvalu, moved to Australia forty years ago and more recently stated in several conferences that Tuvaluans must move to preserve their culture and survive. It appears that he may have the influence to speak directly with the president of Tuvalu and convince him of the need to move Tuvaluans to the Fijian Island of Kioa. Several newspapers seem to follow his plea and have widely covered the news. See, for instance: 'Tuvalu Population Must Move to Preserve Culture', The Epoch Times, 18 February 2006, available at: <<http://www.theepochtimes.com/news/6-2-18/38332.html>>.

⁸⁵⁸ The Statement by President Maatia Toafa was given as a response to Don Kennedy's contentions. It was reproduced by Tuvalu News on 21 February 2006, available at: <<http://www.tuvaluaislands.com/news/archived/2006/2006-02-21.htm>>.

this message: *'It is our belief that Tuvalu, as a nation, has a right to exist forever. It is our basic human right. **We are not contemplating migration.** We are a proud nation with a unique culture which **cannot be relocated elsewhere.** We want to survive as a people and as a nation. **We will survive.** It is our fundamental right.'*⁸⁵⁹ Scholars such as Jane McAdam have shed light on the reasons behind this position, explaining how the 'refugee' label is rejected because it conveys the idea of powerlessness and victimization that is shameful in Tuvaluan culture, and which in contrast is not found in the traditional label of 'economic migrants'.⁸⁶⁰ Given this reluctant approach to climate-induced overseas relocation planning, it does not come as a surprise that Tuvalu does not count so far with an instrument akin to Kiribati's Land Acquisition and Resettlement Policy Framework directed at planning possible *internal* climate-induced resettlements. This gap is all the more facilitated by the fact that both Tuvalu and Kiribati have experienced – particularly during the past decade – a high level of inter-island migration from outer islands and atolls to their respective capitals (Funafuti and Tarawa). Given that such population movement is for a wide range of socio-economic reasons, the exact number of internal climate-induced relocations is difficult to determine. One thing they have in common is that the overpopulation of both capitals, coupled with sea-level rise, has become an important source of concern in Tuvalu, Kiribati, and the Marshall Islands. While Funafuti has lost one metre of land around its circumference, efforts are now being displayed to protect with sea walls the airports of Tarawa and Majuro (capital of the Marshall Islands) from being constantly flooded.⁸⁶¹

Contrary to the high rates of inter-island migration in Tuvalu and Kiribati previously mentioned, internal climate-induced relocations in other Pacific Island States have been reported by national and even by international media and therefore tend not to pass unnoticed or be dissolved in the wider category of national economy-driven population movements. One of the first cases of climate-induced relocation that attracted widespread attention was the resettlement, in 2005, of the inhabitants of the Carteret Islands, located in the Autonomous

⁸⁵⁹ Tuvalu's Prime Minister, H.E. Apisai Lelemia, Poznan UNFCCC COP. 14/MOP.4 (Poznan, 2008). [Emphasis added].

⁸⁶⁰ J. McADAM, *Climate Change, Forced Migration and International Law*, at 41 (footnote n°10), who reproduces the words of Anote Tong, President of Kiribati: *'We don't want to lose our dignity. We're sacrificing much being displaced, in any case. So we don't want to lose that, whatever dignity is left. So the last thing we want to be called is "refugee". We're going to be given as a matter of right something that we deserve, because they've taken away what we have.'*

⁸⁶¹ In the 1980s, the I-Kiribati government developed a plan to relocate people from the overpopulated main island of South Tarawa to the biggest atolls of the Line Islands.

Province of Bougainville of Papua New Guinea. Four years earlier, the same country had witnessed another previous relocation triggered by analogous causes. Yet, despite the fact that the precedent had affected over one thousand inhabitants of the Duke of York Islands, who were relocated to the province of New Britain, and implied the purchase, by the East New Britain Provincial Government, of resettlement lands and emergency supplies, the media remained quite silent about it and the situation passed almost unnoticed. The low coverage of the Duke of York relocation strikingly contrasts with the attention given to the 2005 Carteret Islands relocation, which was not only widely reproduced in the media, but also 'competed' against the parallel relocation of the Lateu settlement in Vanuatu for the title of first scenario of 'climate refugees' in history. Such a shift may be understood as a reflection of the progressive rise of international and public concern about climate change impacts during the first decade of the 21st century, as well as an indication of how the evolution of the Climate Change and International Security Discourse may affect both the understanding of and the policy responses to a relocation situation. What is most relevant about the Carteret and Lateu experiences, ever since they were labelled and identified as the first cases of 'climate-induced relocations', is that they show how relocation is far from being an easy or generally 'natural' experience in this region. Most importantly, they serve as a starting point from which it is possible to extract some of the variables that mark the differences between relocation experiences between Pacific Island States.

2.2.2. Differential Factors: Geographical, Political and Socio-Cultural Dissimilarities of Pacific Island States

To begin with, relocations between Pacific Island States are determined by a socio-cultural variable that either qualifies or enhances the traumatic aspect of most resettlement experiences. This variable focuses on the existence of historical ties between the people affected and their land of origin. Notwithstanding the observable deterioration of their living conditions due to climate-change impacts, communities which have construed their identity in association with a specific and confined ancestral setting tend to be highly apprehensive of the idea of relocation. Evidence of this obstacle to socio-cultural relocation is for instance revealed by several interviews with Carteret islanders, and explains the tendency to delay as much as possible the beginning of the evacuation, even in cases where a relocation plan is ready for implementation. Besides, the relevance of this variable is all the more reinforced when relocation may directly affect indigenous peoples or an ethnic minority. In these cases, not only

will the impact of the resettlement on the socio-cultural identity of the communities be more acute, it may also impinge upon their successful integration into a new place irrespective of whether the relocation takes place within the same State or close to the original lands. This concern has already been raised by Tulele Peisa – the local NGO of Papua New Guinea which is currently leading the relocation of Carteret families – with regard to the inhabitants of the Mortlock, Tasman and Nuguria Islands who are expected to be relocated before 2015. Unlike the Carteret islanders and the Bougainvillians, who are predominantly Melanesians, the Mortlock, Tasman and Nuguria Islands are mainly inhabited by a Polynesian minority. This fact impedes the reproduction of successful actions which have been promoted by Tulele Peisa to ensure the social integration of the Carteret islanders with the Bougainvillians, such as the celebration of inter-community meetings prior to relocation, and even the celebration of marriages. It may also constitute an additional obstacle to the acquisition of new lands from customary landowners in Bougainville Island.⁸⁶²

In addition to the socio-cultural and historical characteristics of the population affected, the variety of relocation experiences among Pacific Island States is highly determined by a political factor. This variable takes into account: (1) whether the national government actually acknowledges the need to resettle part of its population or is more inclined to deny such a necessity (see the opposed official positions taken by Kiribati and Tuvalu explained above); and (2) in the affirmative, whether the presence of the national government in people's daily life is effectively rooted so as to ensure the preparation of a relocation plan, as well as the availability of the resources necessary to implement it. Besides, such a level of governmental 'presence' in communities affected by climate change impacts will determine not only the existence of a relocation plan – or lack thereof – but also the approach to the implementation of the relocation as a whole. Thus, when the community is isolated from the national government and functions as a 'cluster' ordered by local actors (Council of Elders, Heads of the Church, etc.) and customary rules, bottom-up approaches will take the lead over top-down relocation planning.

Relocation experiences of Papua New Guinea, the Solomon Islands and Fiji each provide a good illustration of the relevance of this variable. The Carteret Islands are located in the province of Papua New Guinea known for its mineral resources and as the cradle of several years of civil strife that confronted the Papuan national government against the secessionist forces of the Autonomous Province of Bougainville (APB). Today, the future legal status of the

⁸⁶² The original Carteret Island Integrated Relocation Programme (Bougainville, Papua New Guinea), incorporated fourteen steps until completion of the relocation plan.

province remains uncertain, as the celebration of a referendum has been delayed on several occasions ever since the war came to an end. As a result of this delicate political and historical context, the presence of the national government of Papua New Guinea in the region is rather limited. Thus, when the relocation of Carteret islanders began to be seen as inescapable, the Council of Elders of the community decided to create a local NGO which received the meaningful name of 'Tulele Peisa' ('Surfing the waves in our own way'). This community-based organization thus elaborated a Carteret Integrated Relocation Plan that, after approval by the Council of Elders, was endorsed by the regional government of Bougainville. While the bottom-up approach to relocation planning has the advantage of being more responsive to the real needs of the population affected and of taking better into account the practical post-relocation integration challenges, a limited presence of the national government is a potential source of financial struggle and limits the possibility to find appropriate relocation lands, for only the national government can conduct expropriations.⁸⁶³ For instance, the 2 million kina that the national government of Papua New Guinea had earmarked for the Carteret relocation and had deposited with the provincial government were never used. This contrasts with the increased governmental presence in the Solomon Islands in relocation areas, which shows how participation of national political actors and institutions facilitates access to international funding. Thus, following the resettlement of the community of North Lavella, due to the 2007 tsunami that hit the region, the current President of the Solomon Islands stated that the community relocations of the Ava Labella will be conducted in the near future with the financial support of the European Union under the EU Global Climate Alliance.⁸⁶⁴ Likewise, the involvement of Vanuatu's national government permitted the involvement of the Canadian International Development Agency, which financed the preparation and implementation of the relocation of the Lateu settlement.

Moreover, these cases of accomplished relocations in the Pacific also indicate how the denial by a national government of the need to conduct relocation, as well as its ineffective or weak presence in the locations concerned (whether for organizational, historical, cultural or political reasons) correlatively strengthens local stakeholders and enhances the development of tailored forms of organization. In this sense, other than the paradigmatic example of the Council of Elders of the Papua New Guinean case, it is worth mentioning the capital presence

⁸⁶³ For an early and thorough explanation of the land issues in Papua New Guinea, see M. J. TREBILCOCK, 'Customary Land Reform in Papua New Guinea: Law, Economics and Property Rights in a Traditional Community', (1983) *The Adelaide Law Review*, vol. 9, issue 1, pp. 191-228.

⁸⁶⁴ Relocation of other communities, such as those of Lord Howe, Sikaiana, Fanalei and Walande Islands have also been earmarked.

of the Church in the Pacific. Sometimes, the importance of the Church is linked to its privileged position as a private land owner, which makes it a particularly important stakeholder in relocation as a potential land donor. For instance, in Fiji, the Methodist Church played a fundamental role during the resettlement of the coastal village of Vunidogoloa. Not only did it help the villagers prepare spiritually for relocation and to view it as a positive change, it was also fundamental in making them feel integrated into the new location of their village at a higher altitude. The new site was thus sanctified and received the biblical name of 'Kenani' – which means nothing less than 'the Promised Land' – and it was established that the first Friday of each month would be dedicated to fasting and praying in gratitude for the relocation. Besides, the Methodist Church acted in Vunidogoloa as a representative of the village before governmental authorities, and thus (quite successfully) claimed financial support on behalf of the village. Therefore, the Church has proven to be an important stakeholder that can potentially donate land to resettle communities, help to qualify the cultural, religious or spiritual obstacles to resettlement, while also being an effective local fund-raising actor.

Finally, the third variable that determines the fundamental differences among relocation experiences in the Pacific is geographical. It plays a role in conjunction with the two other socio-cultural and governmental factors described above, and addresses the question of whether the nature of the original location has, for instance, changed from an agricultural to an urban setting, as occurred in Tuvalu and Kiribati. In cases where the relocation occurs in an agricultural setting, access to new land is the central issue, particularly in a region which is characterized by the limited extent of public lands (generally not over 2%). This feature seriously limits the capacity of respective governments to design and implement appropriate relocation plans (in particular in the Marshall Islands, Fiji and Vanuatu), is a source of conflict between public and private actors, and gives great importance to land-tenure negotiations. Moreover, the geographical variable also marks a difference between cases in which the relocation site is land at a higher altitude in the same island and close to the place of origin of the community – such as the Lateu settlement in Vanuatu – and cases in which the village is 'decomposed' into family units which are moved to an already inhabited and different island, as happened to the Carteret islanders, who got integrated into three existing communities of Bougainville Island and worked in plantations there.

All in all, we can conclude that, in contrast to the overall homogeneous and regional approach to the preservation of habitability conditions, disparities among Pacific Island States surface quite quickly when it comes to reactive relocation actions. The important efforts displayed in preventive relocation actions described above strikingly contrast with the

underdeveloped reactive relocation measures in the region. Not only is relocation not being dealt with from a common regional perspective, it has not yet even entered the policy agenda of some of the Pacific Island States at all. Moreover, in cases where reactive relocation actions can be identified, a country-to-country comparative study reveals a rather heterogeneous response to relocations per se, reminding us that the cultural, historical, political and perhaps even psychological differences in each of the relocation scenarios play a crucial role. The heterogeneity of reactive relocation actions is thus driven by a set of socio-cultural, political and geographical variables that form the context in which relocations take place. Therefore, studying how reactions to the same climate-induced relocation challenge differ among Pacific Island States becomes an opportunity to pierce the 'outsider viewpoint' of this region and to explore its more complex and diverse nature.

3. STRUCTURING A PROPOSAL: A MULTILAYERED LEGAL PROTECTION SCHEME FOR CLIMATE-INDUCED DISPLACEMENT IN THE PACIFIC

The comparative study discussed above has shown how preventive and reactive relocation actions in the Pacific have been dealt with differently, receiving uneven attention from governmental authorities, regional and local actors of Pacific Island States. This factual diversity strikingly contrasts with the 'one-dimensional' scholarly tendencies which elaborate legal protection responses to climate-induced displacement by focusing almost exclusively on one international legal avenue. The present section argues that any legal protection scheme for climate-induced displacement based on international law should reflect the factual diversity depicted above. It therefore proposes to conceptualize the legal framework of climate-induced displacement in multiple and complementary layers of protection, so as to address the issue through a new integrative and pluralistic scheme. Such a multilayered legal protection scheme must not only reflect the fundamental connection between climate-induced displacement and the progressive de-territorialization of Pacific Island States detailed in Chapter 4 (the former being a reflection of the latter), but should also relocate the human and territorial pillars within the ultimate issue of this thesis, namely, the survival of Pacific islands as State entities. To achieve this purpose, the continuation of statehood is conceived as the central variable structuring the multilayered legal protection scheme proposed.

3.1. Existing One-dimensional Approaches to Climate-Related Displacement: A Relevant but Incomplete Benchmark

3.1.1. Relevant Diagnosis and International Legal Regimes Analysed

After being for long ignored as a distinct object of regulation, migration flows associated with the wide range of environmental disruptions attributable to climate change is becoming an ever more recurrent object of analysis in international legal scholarship. Several studies have already reflected upon the statutory framework in which these situations might or should fall, identifying normative gaps in areas of international law applicable to these situations, and correlatively suggesting how these gaps could or should be filled. To be sure, the existing literature cannot be criticized for its lack of diversity. As we shall now see in detail, studies have scrutinized international regimes of different nature, ranging from international environmental law to human rights law or refugee law and have also suggested a variety of solutions, from enhanced inter-regime synergies to institutional co-operation. This existing literature is at the core of the proposal for a multilayered legal-protection scheme and forms the basis of its content. As already mentioned in the introduction to the present chapter, the interest in this issue can be traced back to the mid-1980s, following the publication, in 1985, of the El-Hinnawi Report in which a group of experts of the United Nations Development Programme dealt with how the effects of strong environmental disruptions could trigger human displacements. The specificity of these situations was recognized by coining the term 'environmental refugees' and even providing this widely cited definition from the El-Hinnawi Report:⁸⁶⁵

'Environmental refugees are those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.'

While this landmark definition legitimized dealing with this issue from international law and policy perspectives, it also originated a definitional impasse which is revealed by what Jane McAdam identifies as the defining dependency of the legal realm on language and terminology.⁸⁶⁶ This formula was primarily characterized by its wide temporal and special scope. Firstly, the condition of 'environmental refugee' was not limited to cases of

⁸⁶⁵ E. EL-HINNAWI, *supra*.

⁸⁶⁶ In J. McADAM (ed.), *supra*, at 3. See also F. RENAUD, J. BOGARDI, O. DUN and K. WARNER, 'Control, Adapt or Flee: How to Face Environmental Migration?', (2007) *InterSecTions Publication Series of United Nations University Institute for Human Security*, vol. 5. To be sure, the dependency of law on language and terminology stems from the fact that the recognition that a situation may evolve from the mere factual dimension to constitute (at least potentially) a legal category, implies the correlative generation of legal rights and obligations attached to it.

transnational displacement, but could also encompass cases of internal migration. What mattered was whether a move from a specific point of departure (the 'natural habitat') had taken place, irrespective of the point of arrival. Secondly, this definition held that the condition of 'environmental refugee' was not dependent on whether the displacement was temporary or permanent – or, in other words, the irreversibility of the disruption was not an element of the definition of 'environmental refugee'.

The controversy generated by this definition arose when international legal scholars (as well as lawyers from other legal fields and even from other associated disciplines) were faced with the need to deal with the determinant element for a migrant to be characterized as an 'environmental refugee' according to UNEP's definition: the triggering 'cause' of the displacement, referred to in the definition by the generic term 'environmental disruption'.⁸⁶⁷ By strictly focusing on the need to prove a causal link between the existence of an environmental disruption and a human displacement, scholars arrived at a definitional impasse on the term 'environmental refugees' (which *a fortiori* also affected the sub-category of 'climate refugees'), for even assuming that a 'disruption' could be identified objectively, the place that such disruption occurs, in the mind of the migrant, inescapably belongs to the realm of subjectivity.⁸⁶⁸ Faced with the dissatisfactory lack of objective data and scientific

⁸⁶⁷ At this point, it is important not to confuse the cause of the environmental disruption with the cause of the human displacement: while the former is irrelevant under the UNEP definition of 'environmental refugee' (which does not discriminate environmental disruption caused by human action from that resulting from natural causes), the natural causes is the determinant element characterizing a migrant as an 'environmental refugee'. Thus, at first sight, this restriction could very much help the application of the UNEP definition to the sub-category of 'climate refugees', since it permits circumvention of the debates on the uncertain human contribution to climate change. For a general account of the issues raised by the definition provided in the UNEP report, see J. B. COOPER, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', (1998) *New York University Environmental Law Journal*, vol. 6, pp. 480-529; and D. KEANE, 'The Environmental Causes and Consequences of Migration: a Search for the Meaning of "Environmental Refugees"', (2004) *Georgetown International Environmental Law Review*, vol. 16, pp. 209-223.

⁸⁶⁸ Some sectors in favor of recognizing human migration caused by environmental disruption as a distinct category called for the introduction of the migrant's motivation as an element of the category. Christel Cournil and Pierre Mazzega explain that the notion of motivation refers to the numerous complex and interdependent factors converging in a person's psychology and which eventually push the person to abandon the traditional habitat. This permits reintroduction of the notion of 'coercion', central to the characterization of 'traditional' refugees (e.g. suffering political persecution). See C. COUNIL et P. MAZZEGA, 'Catastrophes écologiques et flux migratoires: comment protéger les "réfugiés écologiques"?', (Décembre 2006) *Revue Européenne de Droit de l'Environnement*, vol. 6, pp. 417-427. Moreover, eclectic positions have sought to reconcile both outlooks. For instance, Diane Bates suggested a distinction between three sub-categories of 'environmental refugees', according to the different degrees of free will left by the intensity and immediacy of the environmental disruption: (1) extreme cases leaving no space for free choice (natural disasters, close to 'the coercion of nature'); (2) mid-level cases with a high degree of coercion, but leaving some time for the person to elaborate an adaptation strategy; (3) low-level cases of simple environmental degradation where long-term socio-

information on the links between the existence of an environmental disruption and human migration flows, legal accounts reacted with the expression of a normative position. This shift from description to prescription resulted in polarized positions about which situations *should* be covered or excluded from the 'environmental refugee' category, or even whether such a category should be recognized at all.⁸⁶⁹

More than twenty years after the release of the UNEP definition, a first precedent in the international arena that indicates a trend towards the recognition of a category of 'environmental refugees', the issue is back to the front line within the specific framework of climate change. Most recent scholarly developments on this issue have been undoubtedly connected with the increased concern about this issue shown by some international specialized institutions and agencies which have conducted workshops on this topic and sometimes even incorporated it into their work programme.⁸⁷⁰ As a result, migration flows induced by any of the environmental disruptions associated with climate change began being referred to as 'climate refugees' or 'climate-displaced people'. Although climate change has arguably become the paradigm of modern ecological challenge and is usually bound to specific images which did not exist in anyone's mind back in the mid-1980s, the structure of present works on the protection of 'climate refugees' generally follows the same pattern. Thus, many current accounts of climate-induced displacement which pay attention to the UNEP precedent fall, perhaps inadvertently, into the same trap – namely, the impasse caused by the focus on the need to establish an objective causation between environmental disruption and human

economic factors can be evaluated. See D. BATES, 'Environmental Refugees: Classifying Human Migration Caused by Environmental Change', (2002) *Population and Environment*, vol. 23, issue 5, pp. 465-477.

⁸⁶⁹ Susan Martin points out that apocalyptic scenarios of the issue generally come from environmentalists, whereas migration lawyers and security studies experts tend to be skeptic about or even deny the existence of migration flows caused by environmental disruptions; in S. MARTIN, 'Climate Change, Migration and Governance' (2010) *Global Governance*, vol. 16, at 397-414. Proponents from the 'environmentalist sector' generally base their normative positions on the data provided by Norman Myers, who estimated that, at present, 25 million people could fall within the category, a number which could possibly increase up to 200 million people. See, N. MYERS, 'Environmental Refugees', (1997) *Population and Environment*, vol.19, issue 2, at 167-182; and the widely cited alarmist account by Robert KAPLAN, 'The Coming Anarchy' (February 1994) *The Atlantic Magazine*. In contrast, the group of opponents is more heterogeneous. While the migration law sector fears that an excessive extension of the refugee regime may diminish the protection of 'classical' political refugees, opposition from the field of security studies pertains to a wider intra-disciplinary debate about the revision of the notion of security, which was launched after the end of the Cold War. Some branches of security studies (such as the Copenhagen School) then argued in favor of a holistic notion of security, which would not only encompass its traditional politico-legal dimension, but would also integrate economic, social and environmental sectors into it. See Chapter 1 above and B. BUZAN, O. WAEVER and J. DE WILDE, *Security: A New Framework for Analysis*, 1998, (Boulder, Colo.: Lynne Rienner Publishers).

⁸⁷⁰ See Chapter 3 above, Section 3.2.

displacement – and then try to overcome it with a prescriptive argument. Others, in contrast, by-pass the definitional stage or only touch upon it superficially. At the end of this ‘starting point’, both trends tend plainly to conclude that defining ‘climate refugees’ is a controversial issue, and then get to the core object of their analysis, namely, the state of the law when dealing with such situations.

Legal accounts of ‘climate refugees’ primarily focus on describing and evaluating the current state of the international legal framework within which such situations may fall. At least three international regimes have been scrutinized by different scholars engaged in this evaluation: international refugee law (including specificities of regional developments); international human rights law; and international climate-change law. Most assessments consider that the real problem is either the lack of regulation or its inappropriateness to tackle the phenomenon in question. Thereby, the overall conclusion is generally formulated as a problem of regulatory scarcity.⁸⁷¹ To be sure, the lack of or the inappropriateness of international regulation dealing with the ‘climate refugees’ should not come as a surprise, for migration remains an issue primarily regulated at the national level (or regional level for States Parties to a regional integration organization like the European Union). As policy decisions in this field tend to be closely associated with State sovereignty, bottom-up legal developments – from the national regulation to its eventual recognition in the international arena – are thus more likely to be found in relation to migration issues than in top-down law-making – from adoption of an international agreement to its implementation at the domestic level.

If most regulations of migration flows are in principle adopted at the domestic level, international refugee law is an exception to it.⁸⁷² Given the generalized use of the ‘climate refugee’ formula, eyes unsurprisingly turn towards this international regime when seeking to assess the level of response that the international legal order can provide in these situations. However, the results of this first exploration were quickly disappointing. International refugee law is a regime characterized by the specific historical context from which it emerged, and the correlative political objective embedded in the regulation, which originally sought responding to the case of numerous Europeans who had been displaced by the Second World War.⁸⁷³ This

⁸⁷¹ S. MARCHI, ‘Global Governance: Migration’s Next Frontier’ (2010) *Global Governance*, vol. 16, at 323.

⁸⁷² The two main international instruments that will be referred to in this thesis are the 1951 Convention Relating to the Status of Refugees (adopted 22 July 1951; entered into force 22 April 1954) 189 UNTS 137 (hereafter referred to as the *Refugee Convention*); and its Protocol Relating to the Status of Refugees (adopted 31 January 1967; entered into force 4 October 1967) 606 UNTS 267.

⁸⁷³ See for instance, J. ELLIE, ‘The Historical Roots of Co-operation between the UN High Commissioner for Refugees and the International Organization for Migration’, (2010) *Global Governance*, vol. 12, pp. 345-360.

strong chronological and geographical specificity explains the inherent tendency of the regime to remain narrow in scope.⁸⁷⁴ The 'fear of persecution' by the authorities of the migrant's State of citizenship must be the cause of the displacement for recognition of the refugee status to be granted. This central condition thus requires a persecution of a specific nature and a high degree of coercion attached to it. Some accounts stress, on the one hand, the difficulty of seeing how an environmental disruption induced by climate change could in any way be conceived as a persecution induced by political, ethnic, racial, religious or social motivations. Others also remind us that most situations of acute environmental stress caused by disruptions potentially associated with climate change do not seem to fulfil the essential requirement of coercion either (apart from cases of unexpected and grave natural disasters). Finally, the inherently narrow scope of application of international refugee law is also seen as unsuited to cover the situation of 'climate refugees' for it requires the proof of an individualized or personalized persecution and does not grant refugee status to internally-displaced people, two figures which contrast with the general acknowledgment that 'climate refugees' will take the form of mass flows⁸⁷⁵ and may not necessarily lead to transboundary displacements.

To some extent, the potential openness of the regime to cover these situations may be optimistically evaluated by pointing out the trend particularly followed by some EU Member States. When discussions about the evolution of the EU Temporary Protection Directive arose,⁸⁷⁶ Finland suggested introducing an explicit reference to 'climate refugees' as a specific

⁸⁷⁴ This strict narrowness of the main material scope of application of the two instruments of international refugee law contrast with the broadness of the UNEP definition of 'environmental refugees'. See Article 1(A)(2) of the Refugee Convention, which defines of the term 'refugee' *'as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'* The temporary limitation was then countermanded by Article 1(2) of the Refugee Protocol, which states that: *'For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in Article 1 A (2) were omitted.'*

⁸⁷⁵ See S. SINGH JUSS, *International Migration and Global Justice*, 2006, (Hamshire, UK/ Burlington, USA: Ashgate Publishing Ltd.), at 211, who highlights the view that governmental oppression is very rarely the specific cause of environmental refugees' displacement, particularly because of the need to prove that the persecution is personal or individualized.

⁸⁷⁶ Council Directive 21/55/EC, of 20 July 2001, *on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, Official Journal of the European Communities, 7 August 2001, L 212/12-23. Although this Directive is a regional instrument pertaining to the field of asylum law, it accepts a wider scope of applicability than the 1951 Refugee

category falling within the scope of Article 2, recognizing that the European temporary protection could be granted to '*who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular (...) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.*'⁸⁷⁷ Although opposition from Spain and Belgium prevented the Finnish proposal from being adopted in the EU instrument, Member States remained free to widen the scope of application of the protection when transposing the objectives of the European regulation to their national legal orders. This possibility was followed by Finland and Sweden, whose respective national legislations currently provide for specific protection of 'environmental refugees'.⁸⁷⁸

In turn, scholars address the possible solutions that the human rights regime may provide to protect 'climate refugees', either as an alternative or as a complementary regime to refugee law.⁸⁷⁹ Truly enough, the inapplicability of international refugee law for cases of 'climate refugees' can be overcome by international human rights law, which is characterized by its wide material and personal scope of application as well as by its universal vocation. Almost by definition, international human rights law is applicable to 'every human being'.⁸⁸⁰

Convention and its Protocol, and seemingly becomes also an instrument of temporary human rights protection through Article 2. For this reason, it is addressed in the 'human rights section'.

⁸⁷⁷ Following this line, the United Nations High Commission for the Refugees recommended in 2008 granting protection to people affected by climate change, natural disasters, and other forms of acute distress, 'UNHCR 'Climate Change, the Environment, Natural Disasters and Human Displacement: a UNHCR Perspective', (Policy and Evaluation Service, 29-01-08). See also the results of a seminar held by the International Organization for Migration in the same year, International Organization for Migration, '*Expert Seminar: Migration and the Environment*', (2008) 10 *International Dialogue on Migration*.

⁸⁷⁸ See The Finnish Aliens Act (301/2004, amendments up to 973/2007 included), Section 109(1); and The Swedish Aliens Act (2005/716). See also V. KOLMANNSSKOG and F. MYRSTAD, 'Environmental Displacement in European Asylum Law', (2009) *European Journal of Migration and Law*, vol. 11, at 316, who highlight the fact that a press release from the United Kingdom Foreign Office seemingly indicated a possible evolution in this sense.

⁸⁷⁹ Jane McAdam, for instance, is one of the scholars most prominently arguing against the characterization of climate-displaced people as refugees, and instead emphasizes the important complementary function of the human rights regime for these cases, in J. McADAM (2012), *Climate Change, Forced Migration and International Law*, *supra*, Chapter 2 and 3, pp. 39-98.

⁸⁸⁰ See, for instance, United Nations Declaration on Human Rights (adopted 10 December 1948), Preamble *in fine* ('The General Assembly proclaims this Universal Declaration on Human Rights as a common standard of achievement for *all peoples and all nations* (...)'); or the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 6 ('*every human being* has a right to life'); Article 7 ('*no one* should be subjected to torture'), Article 8 ('*no one* shall be held in slavery'), Article 9 ('*everyone* has a right to liberty and security'). [All emphasis added]. Therefore, both nationally and internationally displaced people, owing to environmental disruptions, may fall within the scope of the regime, and who also count on the protection (non-binding but based in positive law) of the United Nations Office for the Co-ordination of Humanitarian Affairs, (2004) *Guiding Principles of Internal Displacement*, full text and further information available at: <<http://www.idpguidingprinciples.org/>>.

Besides, the fact that most international human rights law instruments only timidly (if ever) recognize an autonomous human right to the environment is not an obstacle to the claims of 'climate refugees', for the affected peoples may invoke violations of, inter alia, basic human rights to life, health and shelter.⁸⁸¹ In this context, the report of the Inter-Agency Standing Committee (IASC) interestingly lists four main categories of human rights which, following an acute environmental disruption, are very likely to be curtailed. These categories follow an order established on the basis of the 'urgent need of protection' criterion.⁸⁸²

The work of the IASC thus highlights the view that the factual context in which 'climate refugees' emerge can affect the system of human rights protection just as exceptionally as armed conflict situations do. However, contrary to armed conflict situations (which are covered by international humanitarian law), the discernible factual context which produces 'climate refugees' does not give rise to the application of a specific set of rules operating as *lex specialis*. Aware of this gap, the work of the IASC points to a possible alternative path for future protection of climate refugees under international human rights law. This would consist of the recognition of an emerging obligation of the State of origin (where 'climate refugees' had their natural habitat) to build up an effective system of risk prevention *prior to* the manifestation of the acute environmental disruption. Hence, under this (arguably controversial) perspective, the State's lack of preventive action would be tantamount to a human rights 'violation'.⁸⁸³

⁸⁸¹ In contrast, the severe consequences of acute environmental disruption permit basing their claims on 'core' human rights, rather than on the 'right to a healthy environment' (which, as the case law of the European Court of Human Rights indicates, has not received strong judicial recognition yet). Apart from the already mentioned right to life, shelter and health, the protection of local culture at stake, the most paradigmatic case at present is that of the Inuit People. See Inter-American Court of Human Rights, *Petition to the Inter-American Court of Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts or Omissions of the United States*, submitted by Sheila Watt-Cloutier with the support of the Circumpolar Inuit Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada, 7 December 2005. For more information, see the website of the Circumpolar Inuit Conference, available at: <www.inuit.org>.

⁸⁸² Inter-Agency Standing Committee, (2006) *Operational Guidelines for the Protection of Human Rights in Natural Disasters*; followed by a manual conceived to guide the action in situ, IASC, *'Human Rights and Natural Disasters, Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disasters'*, (pilot version, March 2008). The four categories are: (1) protection of life, security and physical, mental and moral integrity; (2) protection of rights related to the basic needs of life; (3) protection of socio-economic and cultural rights; and (4) protection of other civil and political rights. See also, International Federation of Red Cross and Red Crescent Societies, *Preparedness for Climate Change: a Study to Assess the Future Impact of Climatic Changes upon the Frequency and Severity of Disasters and the Implications for Humanitarian Responses and Preparedness*, 2–6 December 2003, (Report Prepared for the 28th International Conference of the Red Cross and Red Crescent).

⁸⁸³ The *ex ante* character of the protection is central to this suggestion, for once the environmental disruption has crystallized the State may suffer from a structural deficiency affecting its capacity to protect the population. The violation itself would therefore consist of the negligence of the State in not acting before the crystallization of an acute environmental disruption which de facto diminished its

Finally, given that the central element of characterization as a distinct category is primarily drawn from the cause of their displacement, namely, an acute *environmental* disruption, a look into the possibilities that international environmental law may offer for the protection and governance of 'climate refugees' was bound to be explored by international scholars. At the beginning of the 1990s, voices had already been raised in favour of constructing an international environmental regime into which the issue of 'climate refugees' would be integrated. When the 1992 Rio Summit on Environment and Development took place and the three Framework Conventions on climate change, biological diversity and desertification were adopted,⁸⁸⁴ Gregory McCue, for instance, argued that the increased international co-operation in the protection of the environment, on the one hand, and the issue of migration flows induced by environmental crisis, on the other, were bound by a cause and effect link.⁸⁸⁵ Therefore, McCue argued, setting both issues apart would damage the effectiveness of any attempt to find solutions to the global environmental crisis.⁸⁸⁶ Nonetheless, individuals do not have a space within the international regime on climate change which did not specifically take into consideration the issue of 'climate refugees' either.

In sum, the finding of the studies on the possibilities offered by the international legal order for the protection and governance of 'climate refugees' can be summarized as follows: (1) international refugee law is too context-specific and closely bound to State sovereignty to enable the automatic inclusion of 'climate refugees' within its scope of application; (2) despite international human rights law's wider scope of application, the regime is not effective enough either, for it has not so far recognized acute environmental disruptions as a specific context in which curtailment of human rights may occur. Thus, the regime leaves 'climate refugees' legally 'unarmed' both before the country of origin (by limiting their claim of human rights violation against their own State) and also before the country of arrival. Finally, (3) the

capacity to help its population thereafter. The 'human rights violations' would therefore not stem from the environmental disruption as such, but from the incapacity of the State to continue guaranteeing the protection of its population's human rights after the disaster. In this sense, Kolmannskog and Myrstad have argued that the EU Temporary Protection Directive could be applicable to cases of 'mass flows' of 'climate refugees', since acute environmental disruptions can affect the institutional structure of the State in a similar way to armed conflicts, in V. KOLMANNKOG and F. MYRSTAD, *supra*, at 316-317.

⁸⁸⁴ United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 24 March 1994), 31 ILM 849 (1992); Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) (adopted 17 June 1994; entered into force 26 December 1996), ILM 1328 (1994); and Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993), 31 ILM 822 (1992).

⁸⁸⁵ See for instance, G. S. McCUE, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', (1993-1994) *Georgetown International Environmental Law Review*, vol. 6, pp. 151-190.

⁸⁸⁶ *Ibid.*

international regime on climate change law has been conceived as an inter-State agreement which was built up independently of non-State actors, and therefore any attempt to link the regime with the recognition of 'climate refugees' would be bound to meet this structural obstacle. All these findings lead to a shared and unique diagnosis which can be referred to as the lack of appropriate international regulation. Henceforth, proposals to respond to this normative scarcity and inappropriateness followed this diagnosis. They have taken different forms and have been conceived at different levels of analysis, yet they all share a common ground – namely, the belief that further normative and institutional growth is the solution.⁸⁸⁷ From this standpoint, three main types of collective actions have been suggested in literature on 'climate refugees': reform of the existing instruments; creation of a new instrument; and/or development of synergies among existing regimes.

3.1.2. Limited Normative and Institutional Solutions Proposed

Proposals of normative reforms suggest that the scope of application of the 1951 Refugee Convention and the 1967 Refugee Protocol may be extended to cover 'climate refugees', either by amendment of the Convention itself, through loose interpretation of the instruments by the relevant international institutions, or through specific regional developments of the regime, such as that within the EU. Given the political difficulty associated with treaty amendment procedures and the context-specific rationale of the regime, proposals have generally focused on more indirect ways of obtaining the protection of the refugee regime, such as by using the margin of interpretation that international institutions have regarding the instruments regulating their mandates. Thus, the United Nations High Commission for Refugees could, for instance, be asked to endorse an evolutive interpretation of the High Commission's mandate, as it was already called upon to do, soon after its creation, to permit its continuation beyond the three-year mandate that had originally been accepted.⁸⁸⁸ Following this line, it is worth noting that, in 2008, the High Commission released a recommendation to the European Union in favour of incorporating 'climate refugees' within the scope of application of the EU's Temporary Protection Directive.⁸⁸⁹ Yet, notwithstanding this openness, the Commission has not changed its position when it comes to

⁸⁸⁷ See, for instance, in a previous number of this journal dedicated to climate change governance, M. MONTINI, 'Reshaping Climate Change Governance for Post-2012', (2011) *European Journal of Legal Studies*, vol. 4, issue 1, pp. 8-24, at 17-21; and R. LEAL-ARCAS, 'Alternative Architecture for Climate Change: Major Economies', (2011) *European Journal of Legal Studies*, vol. 4, issue 1, pp. 26-55, at 34-52.

⁸⁸⁸ See KOLMANNSSKOG and MYRSTAD, *supra*.

⁸⁸⁹ *Ibid.*

dealing with the scope of application of *its own* mandate. As K. E. McNamara pointed out, by not recognizing environmental disruptions as one of the possible 'forms of victimization' which may be a ground for a request for the Commission's assistance, the Commission maintains a very strict interpretation of both the terms of its mandate and of the conditions set up in the definition of 'refugee' in Article 1(2) of the Refugee Convention.⁸⁹⁰

Proposals of normative reform not only encompass the revision of the international instruments of refugee law, but may also refer to regional regulations and, most particularly, those developed within a space potentially receiving 'climate refugees', such as the European Union.⁸⁹¹ In this sense, advocates of normative reform through regional arrangements have found support in the evolution of the 2004 EU Qualification Directive, in which Article 2(e) recognizes that claimants who have been denied refugee status (understood as defined in Article 1(2) of the Refugee Convention) may eventually benefit from a subsidiary protection regime, had they faced a '*real threat of suffering a serious harm*'.⁸⁹² Although the High Commission's final list of the acts and facts that can be considered as being likely to provoke 'serious harm' does not include grave environmental disruptions, the issue was discussed at the European Commission. This debate may find its roots in the 2002 petition from the European Parliament calling for the protection of transboundary migrants induced by acute environmental disruptions.⁸⁹³ Moreover, it has also been suggested that the protection of

⁸⁹⁰ This conclusion has been reached for instance in a study based on 45 interviews of UN ambassadors and senior diplomats related to the institutions, see K. E. McNAMARA, 'Conceptualizing Discourses on Environmental Refugees at the United Nations', (2007) *Population and Environment*, vol. 29, pp. 12-24. However, recent accounts seem to point to a more open position of the UN since 2009. See, for instance, Experts Round Table, 'Climate Change and Displacement: Identifying Gaps and Responses. Discussion document available at: <<http://www.acnur.org/t3/que-hace/medio-ambiente/>>.

⁸⁹¹ C. COUNIL, 'Les réfugiés écologiques: quelle(s) protection(s), quel(s) statut(s)?', (2006) *Revue de Droit Public*, vol.4, pp. 1035-1066.

⁸⁹² Directive 2004/83/CE du Conseil, 29 avril 2004, *on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Official Journal of the European Union, 30 September 2004, L 304/12ff. This Directive was the result of a process initiated in 1999 by the 'Tampere Decision' to work towards the creation of a common European asylum system. Tampere European Council, 15-16 October 1999, Conclusions of the Presidency, available at <http://www.europarl.europa.eu/summits/tam_es.htm>.

⁸⁹³ European Parliament, 2002, *Report on the proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, COM (2001) 510-C5-0573/2001-2001/0207 (CNS), Committee on Civil Liberties, Justice and Home Affairs (Rapporteur Jean Lambert). Even more paradigmatic was the proposal for a *European Declaration on the Status of Environmental Refugees*, of 6 April 2004, n°9/2004 (received 28 signatures from the European Green Party), which was not however adopted by the European Parliament. Given that the Qualification Directive is still under revision, it is possible to expect future evolution in this sense. Moreover, it is worth recalling that the European Commission has explored the relation between climate change and

'climate refugees' may be achieved through international or national judicial institutions, which could consider 'climate aggression' as falling within the evolutive interpretation of the notion of persecution, or accept the 'right to environmental asylum' or by recourse to alternative and less controversial notions, such as that of 'non-refugee survival migrants' suggested by A. Betts.⁸⁹⁴

The second category of solutions proposed in reaction to the 'regulatory scarcity' diagnosis suggests that the adoption of a new international convention for the protection of climate refugees would be most suitable.⁸⁹⁵ The advantage of this proposal, put forward by, for instance, Franck Biermann, Ingrid Boas and David Hodgkinson is that it enables taking full account of the specific contextual dimension of 'climate refugees' and constructing a system of protection tailored to the specific characteristics of these situations. Besides, the proposal may even be mirrored at a national level, as suggested in Australia by a political party of the opposition that proposed the creation of a right to environmental asylum.⁸⁹⁶ Nonetheless, co-

migration when discussing the establishment of a common European migration policy. See European Commission, *Communication on Strengthening the Global Approach to Migration: Increasing Co-ordination, Coherence and Synergies*, 8 October 2008, COM (2008) 611/3. On the recent increase in European concern about the issue of 'climate refugees', see N. ITANO, 'Europe Fears "Climate Migrants"', (2008) *Christian Science Monitor*, vol. 100, issue 76, at 6.

⁸⁹⁴ A. BETTS, 'Survival Migration: a New Protection Framework', (2010) *Global Governance*, vol. 16, pp. 361-382. This perspective suggests extracting the common ground of all climate-induced migration, irrespective of the effect of the degree of coercion and the urgency of the environmental disruption on the migrant's psychology, so as to bind all these 'types' of migration under a single common triggering element: the search for survival. Betts' proposal has been backed by civil society actors, see Oxfam International, *The Right to Survive: the Humanitarian Challenge for the 21st Century*, 2009, Oxfam International).

⁸⁹⁵ F. BIERMANN and I. BOAS, 'Protecting Climate Refugees: The Case for a Global Protocol', (2008) *Environment Magazine*, vol. 50, issue 6, pp. 10-16, and, by the same authors, 'Global Adaptation Governance: the Case of Protecting Climate Refugees', in F. Biermann, Philipp Pattberg and Fariborz Zelli, *Global Climate Governance Beyond 2012: Architecture, Agency and Adaptation*, 2010, (Cambridge, UK: Cambridge University Press), pp. 255-269. Following the same line, M. HULME, 'Climate Refugees, Cause for a New Agreement?', (November/December 2008) *Environment*, vol. 50, issue 6, pp. 50-52; R. DOCHERTY and T. GIANNINI, 'Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees', (2009) *Harvard Environmental Law Review*, vol. 53, pp. 49-403; D. HODKINSON and L. YOUNG, 'In the Face of a Looming Catastrophe: a Convention for Climate Change Displaced Persons', (2012), available at <www.ccdpconvention.com>, based on previous works, such as D. HODKINSON et al., 'The Hour When the Ship Comes in: a Convention for Persons Displaced by Climate Change', (2010) *Monash University Law Review*, vol. 36, at 69; D. HODKINSON et al., 'Copenhagen, Climate Change "Refugees" and the Need for a Global Agreement', (2009) *Public Policy*, vol. 4, pp. 155-174; and D. HODKINSON et al., 'Towards a Convention for People Displaced by Climate Change', (2008), *New Critic*, vol. 8, pp. 1-6, available at: <<http://www.ias.uwa.edu.au/new-critic>>.

⁸⁹⁶ The Australian Labor Party called for an international coalition to accept climate refugees from the Pacific, in response to the government's position, which was against the recognition of such category, and the Australian Green Party (Senator Kerry Nettle) put forward a Migration (Climate Refugees) Amendment Act in 2007, which sought the revision of the Australian 1958 Migration Act by introducing a definition of 'climate change induced environmental disaster' and a clause on the granting of 'climate

operation on this matter at the international level remains highly controversial and, therefore, the adoption of a Climate Refugee Convention as a Protocol to the UNFCCC remains unlikely to crystallize in the short term.

Finally, alternative 'mid-way' proposals stress the potential utility of developing inter-regime synergies to complement adaptation mechanisms of the international regime on climate change. Angela Williams has therefore suggested that these synergies could be displayed through the development of the regional agreements operating under the UNFCCC.⁸⁹⁷ This proposal remains close to the classical conception of migration as a form of adaptation to the changing conditions of the habitat, and bases the normative connection on the obligation of States Parties to the Convention and to the Kyoto Protocol to co-operate and help finance adaptation measures.⁸⁹⁸ Given that migration flows tend to take place within the same region for reasons of geographical (and sometimes also cultural) proximity, the proposal to enhance regional co-operation in these matters has, in principle, various advantages: it sounds practical and potentially more effective, since co-operation at this level of analysis helps to tailor the regulation to the specific reality of the region; it avoids relying on the political will of a large number of States to adopt an international regulation for 'climate refugees'; and the preservation of the traditional definition of refugee contained in the 1951 Refugee Convention is ensured. Moreover, another proposal advancing the benefits of inter-regime connections suggests approaching climate change from a human rights perspective.⁸⁹⁹ This position stems from the fact that the adverse effects of the phenomenon are very likely to affect and even obstruct achievement of the object and purposes of the main international human rights instruments, previously elaborated for the protection of citizens from abuses by their own States.⁹⁰⁰ Moreover, the international regime on climate change, built to decrease

refugees visas'. Amended text available at:
<<http://www.austlii.edu.au/au/legis/cth/bill/mrab2007342/>>.

⁸⁹⁷ A. WILLIAMS 'Turning the Tide: Recognizing Climate Change Refugees in International Law', (October 2008) *Law and Policy*, vol., 30, issue 4, pp. 502-529.

⁸⁹⁸ UNFCCC, Article 4(e).

⁸⁹⁹ See Stephen HUMPHREYS (ed.), *Human Rights and Climate Change*, 2010, (Cambridge, UK: Cambridge University Press). This book is the result of a collective contribution and results from the 2008 programme initiated at the United Nations Human Rights Council by Resolution 7/23, *Human Rights and Climate Change*, adopted on 28 March 2008. Information about the programme currently in course is available at: <<http://www2.ohchr.org/english/issues/climatechange/study.htm>>.

⁹⁰⁰ See, for instance, J. HALL and D. WEISS, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human rights Law', (2012) *Yale Journal of International Law*, vol. 37, at 309-364; M. LIMON, 'Human Rights and Climate Change: Constructing a Case for Political Action', (2009) *Harvard Environmental Law Review*, vol. 33, pp. 439-476; and S. McINERNEY-LANKFORD, 'Climate Change and Human Rights: an Introduction to Legal Issues', (2009) *Harvard Environmental Law Journal*, vol. 33, pp. 431-437. A more

the aggravation of global warming (mitigation policies) and to halt its adverse effects once it becomes inevitable (adaptation policies), may create side-effects in the realization of human rights. Mitigation policies establish the future distribution and usage of natural resources among States with no concern for the effects that such new redistribution may have on individuals. Finally, adaptation policies, which are by nature more suited to address the new climate change challenges, such as 'climate refugees', remain insufficiently financed and underdeveloped. However, the main difficulty of this proposal is to reconcile the two underlying rationales of each international regime, which are different in nature and structure, so as to regulate the issue by integrating both dimensions in a coherent and holistic way.⁹⁰¹

Undoubtedly, the three international regimes, established *prima facie* to operate in cases of climate-induced displacement, which have already been dealt with in international legal scholarship, are highly appropriate to address the relocation cases in the Pacific, depicted above. Firstly, as already pointed out in this section, international environmental law – particularly climate change adaptation law and policy – is already an indispensable tool for preventing the excessive degradation of the habitability conditions of settlements in the Pacific that may lead to international or transnational relocations. The regional co-operation amongst all Pacific Island States, conducted multilaterally through the SPREP Pacific Adaptation Project, as well as bilaterally through Joint National Action Plans, are currently vivid examples of the relevance of this regime to this issue of climate-induced displacement. Moreover, it is worth analysing whether transnational climate-induced displacements of I-Kiribati and Tuvaluans to Fiji, Australia or New Zealand may be covered by international refugee law, so as to eventually provide them with legal protection tools in 'host countries'. Finally, in all situations indicated in this study, whether at a preventive and reactive stage of the relocation process and regardless of whether the displacement is international or internal, a wide range of Pacific islanders' substantive and procedural human rights are fundamentally at stake.

Nonetheless, the pitfall of the approaches suggested lies in the fact that they tend to focus exclusively in one of the three legal avenues. As the issue of climate-induced displacement is analysed from one angle – mainly human rights, refugee law or international environmental law – solutions emerging from the identification of the normative and

detailed account of the relevance of human rights law and human rights approaches to climate change law is developed in Section 4.1.1 below.

⁹⁰¹ Thus, the discourse on the protection of global commons, inclusive and communitarian, contrasts with the rationale of the human rights discourse, fundamentally individualistic and adversarial. See S. HUMPHREYS, 'Competing Claims: Human Rights and Climate Harms', in S. Humphreys (ed.), *supra*, at 37-69.

institutional deficiencies existing in each of the three regimes are also conceived from a unidirectional perspective. Although the proposals formulated so far are multiple and diverse – ranging from normative development and reform to inter-regime solution synergies, institutional co-operation and judicial activism – they are all based on an equally ‘universalist’ normative blueprint, which does not match the inherently heterogeneous – and therefore particularistic – condition of Pacific climate-induced relocations depicted above. Therefore, while acknowledging the relevance of the regimes analysed, as well as the solutions proposed so far, it is fundamental to consider that a legal protection framework must be able to adapt to the specificities of each relocation case, which result from the socio-cultural, geographical and political variables explained above. Rather than prioritizing the use of problematic theoretical approaches which are then tested in pilot countries and often lead to definitional *impasses*, the reality displayed by this regional case study invites the elaboration of a legal protection scheme by induction.

3.2. Multidimensional Legal Protection Scheme for a Heterogeneous Factual Landscape: A New Integrative and Pluralistic Proposal

3.2.1. Widening the Spectrum: A Myriad of Potentially Applicable International Legal Regimes

Vladimir S. Soloyov wrote that *‘the moral principle does not allow us to transform a concrete person, a living man with his inseparable and essential national characteristics into an empty abstract subject with all his determining peculiarities left out’*.⁹⁰² Taking stock of this challenging and compelling warning – as well as ethical dictum – the present section suggests approaching the issue of climate-induced relocation through a scheme consisting of several layers of legal protection. Such a scheme contemplates and includes the protection that can be offered by the three legal regimes laid out above and already analysed in international legal scholarship, but not limited to them. While avoiding falling into an excessively casuistic approach to climate-induced relocation in the region, the multilayered legal protection scheme is proposed to provide a legal translation of the factual heterogeneity previously highlighted, one that acknowledges the variability of forms of vulnerability and the respective specific needs resulting from the variables previously identified. Such factual differences are thus the source from which the structure of the scheme emerges, which has the advantage of introducing a certain degree of flexibility into the comparison with the existing ‘universalist’ approach to this issue, while simultaneously pointing to new and unexplored legal avenues

⁹⁰² V.S. SOLOYOV, *The Justification of the Good: an Essay on Moral Philosophy*, 2010, (Cosimo Inc.).

which may be relevant in cases of climate-induced relocation. These become ever more visible when the configuration of this multilayered legal protection scheme (which will only consider treaty law) is based on the role of the different States involved in climate-induced relocation cases are called on to play.

Moreover, it is intended to cover Pacific islanders or the ‘population’ of Pacific Island States. As a matter of principle, the category of ‘population’ will be understood in a wide sense covering all people subject to the (territorial) jurisdiction of a Pacific island State, including – but not limited to – the citizens living in any of the countries under study, as well their permanent residents.⁹⁰³ This is ‘abstract’ and a structural approximation prior to identifying instruments, the relevant provisions at stake and their applicability in the region.

TABLE 5. Multilayered Legal Protection Scheme for Climate-Induced Displacements in the Pacific

| Possibly Relevant Legal Regime | STATEHOOD NOT AT RISK | | STATEHOOD ENDANGERED | | | |
|---|-----------------------|------------|-------------------------------|---------------|-----------------------------|---------------|
| | National Displacement | | Transnational Displacement | | | |
| | Prevention | Relocation | Partial State of origin | Host State | Total State of origin | Host State |
| International Human Rights Law | Yes | Yes | Yes | Yes | ? | Yes |
| National Human Rights Law (Constitutional Law) | Yes | Yes | Yes | Yes | ? | Yes |
| International Environmental Law | Yes | Yes | ? | ? | No | No |
| National Environmental Law | Yes | Yes | No | No | No | No |
| International Migration Law | No | No | Yes | Yes | ? | Yes |
| National Migration Law | No | No | Yes | Yes | No | Yes |
| Guiding Principles on Internally Displaced People | ? | Yes | No | No | No | No |
| International Refugee Law/Statelessness Status | No | No | Yes | Yes | Yes | Yes |

3.2.2. (Re)-Introducing the Role of the State in the Configuration of a Legal Protection in Climate-Induced Relocation

The fundamental place of the State actions is generally and primarily associated with its role as a factor in preventive relocation measures – such as the development of climate change adaptation projects with neighbouring States. To a certain extent, this role is equally

⁹⁰³ To some extent, this proposal seeks structuring along one coherent axis what Jane McAdam had already defined as the fragmentation of climate displacement governance. See J. McADAM, *Environmental Displacement Governance*, (2010) UNSLRS Paper 1, pp. 1-33

pinpointed with regard to reactive relocation actions – such as the elaboration of relocation plans, provision of funding, and organization of its implementation phase – particularly in cases where relocation takes place at a national level and the State has full competence in the process as a whole. The recognition of the presence of the State in these cases limits the traditional dichotomies confronting Mankind and the Environment, on the one hand, and the Individual against The State, on the other.⁹⁰⁴ Instead, it invites the conceptualization of a tridimensional relationship, in which the protection of the people against environmental disruptions of their habitat is ensured by the active role of the State in which such habitat lies. As Table 4 above showed, the role varies according to the specific needs of each case; whereas in bottom-up approaches to relocation planning, the State acts primarily as a co-ordinator of the actions elaborated and undertaken by provincial and local actors; top-down approaches are bound to endow the State with a more active role, in which it is called on to manage, finance and design relocation plans, and even negotiate the international agreements that may be necessary (e.g. Kiribati and Tuvalu).⁹⁰⁵

Yet, there is a second and equally fundamental function of the State in the context of climate-induced displacement which has generally and consistently been neglected. While acting as an operative that seeks to guarantee the basic living conditions of its population, the State *itself* becomes simultaneously the subject of protection of *its own* preventive and reactive relocation actions. This secondary subject of protection is particularly visible when taking into consideration the threat that large amounts of transnational displacements may represent for the continuation of statehood of Pacific Island States. In these cases, the protection of the State's continuation is a sort of by-product of the actions seeking to protect the population affected by relocation, since all contributions to the pre-emption of transnational climate-induced displacement may also be understood as protection strategies for the continuation of statehood. Simply put, the fate of Pacific islanders is bound to the fate of their respective Pacific island State.

The multilayered legal protection scheme proposed is shown in Table 5, above, which is

⁹⁰⁴ Binary divisions stem from enlightenment and French rationalism. They are also at the root of the anthropocentric view of environmental protection, which has been criticized extensively by, for instance, C. REDWELL, 'Life, the Universe and Everything: a Critique of Anthropocentric Rights', in A. BOYLE and M. ANDERSON (eds.), *Human Rights Approaches to Environmental Protection*, 1996, (Oxford: Clarendon Paperbacks), pp. 71-108

⁹⁰⁵ On the specificities of the role of the State in environmental protection contexts, see T. MARAUHN, 'The Changing Role of the State', in D. BODANSKI, J. BRUNÉE and E. HEY (eds.), *The Oxford Handbook of International Environmental Law*, 2007, (Oxford, New York: Oxford University Press) Chapter 31, pp. 727-747.

structured by one main variable, namely, whether the continuation of the State is put at stake by presently or potentially large amounts of transnational population displacements or not. It considers that the continuation of the State is not at risk when climate-induced displacements and relocations take place at a national level, cases in which there is only one State directly engaged in the relocation. The State's obligations and responsibilities, corollary of the rights of the population affected, may be divided into two groups, according to whether they belong to a relocation prevention phase or to a reactive relocation phase. In cases where climate-induced displacements and relocations take place at an international or transnational level, the continuation of the State may be at risk. Although these situations are up to now a minority in the Pacific, they cannot be disregarded in future projections, for they undoubtedly constitute the more challenging scenarios for international law and policy in various areas and a potential source of important developments and controversies in the field. This scenario is therefore sub-divided into two groups – situations of partial de-population and situations of total de-population. From a legal perspective, the web of responsibilities and obligations becomes more complex, for at least two States come into play – the State of origin and the host State. All in all, Table 5 shows how different areas of national and international law may be relevant to the protection of people displaced as a result of the effects of climate change, depending on the scenario in which such displacement (and eventual relocation) takes place. It serves as a roadmap or frame of reference in which legal analysis of the extent of the rights and duties of both the States involved and the populations affected can be situated.

However, setting up the structure of a legal protection scheme is not enough. To make it meaningful, it is necessary to determine or identify in detail the specific typologies, boundaries and legal content of each of the situations marked in Table 5. The purpose of the following section (4) is therefore to identify how climate change impacts on vulnerable communities can substantiate an international protection claim under a *variety* of regimes. In doing so, identifying the States involved in each scenario is fundamental. The next section will thus reflect the divisions shown in Table 5, primarily marked by the 'contextual variable' separating scenarios in which climate-induced displacement takes place within the boundaries of a State and therefore do not risk jeopardizing the continuation of the State, from overseas relocation scenarios potentially putting at stake the continuation of the State of origin of the population.

4. SPECIFYING THE PROPOSAL'S LEGAL CONTENT: FRAGMENTED AND FLEXIBLE REGULATION FOR CLIMATE-INDUCED MIGRATION IN THE PACIFIC

4.1. Statehood Not at Risk: National Climate-Induced Displacements in Pacific Island States

As shown in Table 4, cases of climate-induced displacement so far encountered in the Pacific have predominantly taken place at a national level. While their relocation undoubtedly affects the population, it does not correlatively endanger nor does it raise the question of the continuation of the State itself, for no total 'de-population' is taking place. Therefore, this section focuses on the specific content to be given to the legal-protection scheme for the people affected by relocation in cases where the contextual variable is not only steady but also revitalized, as the State has the active task of responding to the challenge that climate-change disruptions represent for the habitability conditions of the population settled in its territory. One is thus led to scrutinize the responsibilities and obligations of the State towards its inhabitants, both individually and collectively (local communities). In this setting, the State can be approached as much as the primary guarantor of the continuation of the bond between a population and their territory as – in cases where the original location of the settlements has to be evacuated – the ultimate guarantor of the underlying conditions necessary for the creation of such a bond with the new site. Following the distinction laid down in the preceding section, the two main sorts of strategies for response to climate-induced relocation that the State is expected to undertake are defined by a temporal variable: preventive relocation strategies – mainly focused on strengthening adaptation capacity and resilience with respect to the habitability conditions of the original site of the human settlements; and reactive relocation strategies centred on the evacuation and resettlement procedure, as well as integration into the new site. When determining the content of the legal framework applicable to internal policy strategies in response to an internal issue, national law will play a role as great as – if not greater than – international law.

4.1.1. Legal Framework in a Preventive Relocation Phase: Preservation of Basic Habitability Conditions

Limited Direct Applicability of Human Rights Treaty Law with General Scope

International human rights law is undoubtedly the first international legal regime to explore in order to identify and define the 'rights holders' and 'duty bearers' in a situation

involving individuals and the State in a vertical relationship.⁹⁰⁶ In preventive relocation scenarios – where the State is called upon to take measures to preserve what we referred to above as the *habitability conditions* of its population – a range of fundamental rights, such as the right to health, the right to food, the right to access to water and the right to appropriate sanitation are involved, essentially corresponding to rights contained in the International Covenant of Economic, Social and Cultural Rights (ICESCRs).⁹⁰⁷ As recalled by the 2011 World Bank Study on Human Rights and Climate Change, it is generally acknowledged that the recognition of such rights in the Covenant does not impose on States Parties an immediate obligation of result. Rather, the realization of economic, social and cultural rights is conceived as a progressive evolution ‘in accordance with the capacities of each State’.⁹⁰⁸ Moreover, the Commission on Economic Social and Cultural Rights (CESCR) has specified three different types of duties incumbent upon the State within the territory under its jurisdiction and effective control for the realization the rights contained in the Covenant. These are the duty to respect, the duty to protect, and the duty to fulfil treaty-based rights.⁹⁰⁹

⁹⁰⁶ The focus in this study of the ‘classical’ or ‘original’ forms of human rights law (operating between the State and its population), in no case constitutes a negation of the applicability of this regime in horizontal individual–individual relationships. The focus on vertical effects of human rights obligations stems from the explanation of the Human Rights Committee (charged with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights), which states that the obligations under Article 2(1) of the Covenant ‘are binding on States [Parties] and do not, as such, have a direct horizontal effect as a matter of international law’. UN Human Rights Committee, General Comment nº 31, ‘Nature of the General Legal Obligation of State Parties to the Covenant’, (2004) UN Doc.CCPR/C/21/Rev.1/Add.13.

⁹⁰⁷ International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; entered into force on 3 January 1976, 933 U.N.T.S 3. These rights are recognized by States Parties in Article 11 on ‘the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions’; as well as in Article 12, recognizing the right to the ‘highest attainable standard of physical and mental health’, and stating that steps necessary to the full realization of this right include: ‘(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.’

⁹⁰⁸ S. McINERNEY-LANKFORD, M. DARROW and L. RAJAMANI, *Human Rights and Climate Change: a Review of the International Legal Dimensions*, May 2011, (Washington DC: World Bank), at 6. As the Report explains, the language of the ICESCRs ‘contemplates that, to some degree, the rights will be met through progressive realization rather than immediately’, although this level of flexibility in the way of complying with their obligations does not prevent States from having to take ‘immediate, concrete and targeted steps towards the realization of such rights’ and ‘show that they are using the maximum extent of available resources towards the realization of the rights’.

⁹⁰⁹ *Ibid.* For an explanation of the meaning and content of these three duties, see United Nations, Commission on Economic, Social and Cultural Rights (CESCR), General Comment nº12, ‘The Right to Adequate Food’, 1999, E/C.12/1999/5, and CESCR, General Comment nº14, ‘The Right to the Highest Attainable Standard of Health’, 2000, E/C.12/2000/4. The duty to respect the rights themselves refers to the duty of the State to refrain from actions that may interfere with, impair or violate the enjoyment of

Though such a tridimensional perspective on the duties of the State, the CESCR undoubtedly contributed to the construction of a comprehensive and global protection of the rights at stake, its beneficial effects have a rather limited application in the Pacific, given that no Pacific island State, except Papua New Guinea and the Solomon Islands, has ratified the ICESCRs.⁹¹⁰ There are many reasons possibly explaining why the Pacific has the lowest ratification rate of human rights treaties in the world. While the Office of the High Commission on Human Rights (Regional Office for the Pacific) emphasizes the obstacles related to the lack of resources – which may impair countries' capacities to comply with reporting obligations⁹¹¹ – factors associated with the existence of local customs that clash with the western conception of economic, social and cultural rights cannot be disregarded.⁹¹² Cultural determinism can in effect preclude the possibility for Pacific island governments to adapt their national legislation to be consistent with human rights instruments, particularly in areas that are commonly regulated by old customary rules and local traditions (such as family law, land rights, women's role in the community, etc).⁹¹³

Interestingly, Pacific Island States have preferred avoiding ratification altogether, instead of overcoming the points of friction between the standards imposed by human rights instruments and their local customs by accompanying the instrument of ratification with declarations of interpretation or even reservations they would deem necessary. This choice might be

the rights of individuals under its jurisdiction; the duty to protect, in contrast, requires a positive and more active attitude of the States, which should preserve the enjoyment of the rights from interference by private action; and the duty to fulfill requires the States to take action to facilitate, provide and promote the rights at stake.

⁹¹⁰ The Solomon Islands succeeded the United Kingdom as a State Party to the ICESCRs on 17 March 1982 (maintaining the reservations previously made by the United Kingdom). Besides, on 29 September 2009, the Solomon Islands signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted in New York, 2008); Papua New Guinea acceded to the ICESCRs on 21 July 2008 but has not yet signed the Optional Protocol. See Table 6 below for the ratification of other relevant human rights treaties. Information available at the United Nations Treaty Collection website: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (for status of ratification of the Convention); and <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> (for status of ratification of the Optional Protocol).

⁹¹¹ See United Nations Office of the High Commissioner on Human Rights (Regional Office of the Pacific), *Ratification of International Human Rights Treaties: Added Value for the Pacific*, Discussion Paper, July 2009, (Suva, Fiji: OHCHR's Regional Office of the Pacific), at vii.

⁹¹² See K. HAINES-SUTHERLAND, 'Balancing Human Rights and Customs in the Pacific Region: a Pacific Charter of Human Rights', (2010) *ANU Undergraduate Research Journal*, vol. 2, pp. 125-141.

⁹¹³ For instance, the welfare of Samoan families very much depends on the capacity and willingness of each family's *matai* to support and represent them, to the extent that the suitability to complement this ancestral and pre-colonial system of community organization when the *matai* system fails, has already been pointed out by the Regional Office of the Pacific of the OHCHR's, in *Protection of Human Rights of Internally Displaced People: Challenges of the Pacific*, Discussion Paper, 2011 (Fiji: Davui Printery), at 7.

motivated by the mistaken understanding that a State must comply with the human rights standards before it become a Party to the Treaty, which, according to the latest OHCHR report on this matter, is widespread in the region. However, it may also exemplify how States are sometimes reluctant to commit to obligations contained in an international treaty negotiated and perfected while the State in question had not yet acquired full political independence.⁹¹⁴ The relatively recent attempts to set the basis of a regional human rights system which – following the example of the European, the Inter-American and the African systems, although not yet so ambitious – can support this analytical interpretation of Pacific Island States' behaviour. Already in 1989, the first attempt to elaborate a Pacific Charter on Human Rights had seen the light.⁹¹⁵ More recently, the Pacific Islands Forum – today's principal form of regional institutional co-operation – places human rights as 'a fundamental component of the vision of the Pacific Island Leaders'. Initiative 12.4 of the Pacific Plan thereby supports the '*appropriate ratification and implementation of international and regional human rights conventions, covenants and agreements, and support for reporting and other requirements*', which is considered as an essential step to improve the institutional governance within and between Pacific Island States.⁹¹⁶

Nonetheless, in spite of these regional developments, the level of ratification of international human rights treaties falls too short to formally consider international human rights treaty law (in particular, the ICESCRs) as a possible conventional source of rights that a population can oppose to its State. This indirectly provokes a heavy reliance on constitutional law recognizing fundamental rights, as well as on the judicial and non-judicial institutions tasked with their protection and enforcement. According to the Regional Office of the Pacific of the OHCHR, most Pacific Island States recognize civil and political rights in their constitutions, but only timidly mention – if ever – economic, social and cultural rights.⁹¹⁷ To be sure, an extended comparative study of Pacific Island States' constitutional legislation and case law on

⁹¹⁴ This might partly explain why ratification rates of much more recent instruments, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women are much higher. See Table 6, below.

⁹¹⁵ The first unsuccessful attempt to agree on and implement a human rights charter for the Pacific can be traced back to 1989. It stemmed from an initiative of the Law Association for Asia and the Pacific (LAWASIA), Human Rights Committee, *Draft Pacific Charter on Human Rights and Explanatory Memoranda*, 1989 (Kensington, NSW: LAWASIA). See P. BUTLER, 'A Human Rights Charter for the Pacific' (paper presented at the Human Rights Research Seminar), at 2.

⁹¹⁶ More details on the background and the currently ongoing revision of the Pacific Plan can be found at the website of the Pacific Islands Forum, including specific actions derived from it (such as collaboration with the Regional Office of the Pacific of the OHCHR: <<http://www.forumsec.org/pages.cfm/political-governance-security/human-rights/>>).

⁹¹⁷ OHCHR, *Ratification of International Human Rights Treaties*, *supra*, at vii.

the matter would be needed in order to make a precise evaluation of the level of normative recognition of Pacific islanders' economic, social and cultural rights opposable against their State of residence. While such a delicate task falls outside the scope of the present chapter, the context makes it worth mentioning that the creation of National Human Rights Institutions (NHRIs) in the region seems to be in vogue. NHRIs apply the so-called 'Paris Principles'⁹¹⁸ and operate as interlocutors between international human rights treaty bodies and national institutions, seeking the promotion of human rights through national institutions' own systems of assimilation. Most recently, the first NHRI of a Pacific island State was set up in Suva (Fiji), with the financial support of the European Union and has just released an important survey of the level of Fijian recognition and respect of human rights, based on Fijian case law and national legislation.⁹¹⁹ If other NHRIs were to be set up in Pacific Island States, access to information by the Pacific islanders of each State would not only be facilitated, but would also help in drawing up a comparative survey of the state of recognition of economic, social and cultural rights in the region.

Usefulness of Climate Change Law from a Human Rights Approach

The fact that the main international human rights treaty relevant in a preventive relocation scenario phase – namely, the ICESCRs – is not applicable in eleven out of the twelve Pacific Island States does not, however, imply that the region has completely neglected the realization of the rights contained in such instrument. Albeit through indirect means associated with international environmental law obligations, of the three duties incumbent upon the State for the realization of economic, social and cultural rights, the duty to protect has been particularly implemented. In contrast to the low rate of ratification of international human rights treaties, all Pacific Island States are parties to the United Nations Framework Convention

⁹¹⁸ The *Paris Principles Relating to the Status of National Institutions for the Promotion of Human Rights*, were adopted in 1991 by the NHRIs at an international workshop held in Paris and marked the standardization of this new form of international human rights co-operation. They were then endorsed by UN General Assembly Resolution A/RES/48/134, 'National Institutions for the Promotion and Protection of Human Rights' (with Paris Principles Annexed), 48th session, 4 March 1994; as well as by the UN Commission on Human Rights Resolution 2005/74, 'National Institutions for the Promotion and Protection of Human Rights', 59th meeting, 20 April 2005. See UN Office of the High Commissioner for Human Rights, *Assessing the Effectiveness of National Human Rights Institutions*, 2005, (Versoix, Switzerland: International Council for Human Rights Policy and OHCHR). More detailed information on NHRIs can be found at the OHCHR website at: <<http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>>.

⁹¹⁹ See Fiji Human Rights Commission, *Bill of Rights: International Legal Analysis*, updated 2009, available at the website of Fiji's Human Rights Commission at: <http://www.fhrc.org.fj/index.php?option=com_docman&Itemid=12>.

on Climate Change as well as to the Kyoto Protocol. Under the AOSIS umbrella, they have been playing a very active political role ever since the start of the regime,⁹²⁰ certifying thereby the top level of concern that climate change is given in the agenda of Pacific islands' governmental structures.⁹²¹ To be sure, as the World Bank Report recalls, the international regime on climate change is not tailored as a '*construction of a legal framework of rights/obligations between the individual and the State*'.⁹²² Rather, its structure responds to a '*global goods perspective*'.⁹²³ and is more explicitly built upon the principle of reciprocity, as clearly revealed by the primary purpose of the regime – namely, the reduction of man-made greenhouse-gas emissions.⁹²⁴ Yet this structural characteristic does not preclude the regime from indirectly serving the realization of economic, social and cultural rights.

To begin with, one of the difficulties raised by the international human rights legal framework is that, as the World Bank report explains, it '*appears somewhat **reactive** in its design, geared more towards redressing past or imminent harms than the speculative business of scientific predictions pertinent to climate change*'.⁹²⁵ Such an *ex post* perspective inherent in human rights law strikingly contrasts with the 'preventive' approach inherent in climate mitigation within the UNFCCC. Henceforth, from a structural perspective, the climate change regime as a whole may be better suited to filling some of the normative lacunae in preventive relocation scenarios. In addition, recent developments within the regime complement this *prima facie* beneficial characteristic, as the scientific- and economy-driven rationales that originally grounded it are now being progressively diluted in favour of a perspective more inclusive of the 'human face' of climate change. This slow and delicate shift is becoming particularly visible through the changing evaluation and quantification conducted by the relevant institutions of the regime in the context of climate change adaptation measures. The most prominent example of such a 'humanization move' can thus be found in the criteria used by the IPCC when measuring climate change impacts in the most vulnerable countries. Particularly since the publication of the IPCC's 2007 Fourth Assessment Report, comprehensive

⁹²⁰ S. KRASNER (ed.), *International Regimes*, 1983, (Ithaca, NY: Cornell University Press), who defined regimes as '*a set of explicit or implicit principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area*'.

⁹²¹ For an overall view on the influence exerted by small island States in different international fora where their interests were involved, see J. GROTE, *The Changing Tides of Small Island States Discourse: a Historical Overview of the Appearance of Small Island States in the International Arena*, pp. 164-191

⁹²² S. McINERNEY-LANKFORD, M. DARROW and L. RAJAMANI, *supra*, at 53.

⁹²³ *Ibid.*

⁹²⁴ Perhaps one of the most visible examples of the 'global goods perspective' on which the climate change regime is based can be found in the last paragraph of the UNFCCC Preamble, which reads '*[The Parties to this Convention] Determined to protect the climate system for present and future generations*'.

⁹²⁵ *Ibid.*, at 47. [Emphasis added].

social and community-based approaches have an increasingly more prominent place in the considerations of what the IPCC actually considers as climate change impacts.⁹²⁶ All in all, the idea that environmental degradation may interfere with the enjoyment of human rights – or become a great obstacle to the realization of such rights – is progressively being acknowledged in the international regime on climate change. This move will be referred to as the incorporation of a *human rights approach* to international climate change co-operation, taking the lead over the alternative strict approaches that argue in favour of inter-regime synergies between human rights and climate change ‘law’ (understood in a formal sense).

As a corollary to the acknowledgement that environmental degradation may interfere with human rights, measures seeking to halt or diminish the impacts of climate change are increasingly considered as factors facilitating the realization and enjoyment of such rights. Specific application of the human rights approach to climate change adaptation can thus be found, as the ‘articulation of the relationship between adaptation and human development or human welfare’ is being promoted by the institutions of the human rights regime. The five Pacific Island States listed as Least-Developed Countries have conducted such articulation mainly by mainstreaming human rights, human welfare and human development all together during the elaboration of their Nationally Appropriate Plans of Adaptation. From a substantive perspective, one of the main manifestations of the link between adaptation and human development is that their NAPAs are primarily directed towards the preservation of the populations’ basic survival *needs*. It has also resulted in the incorporation by Pacific Island States, other than the five LDCs, of climate disaster management in both development and adaption programmes, such as the Joint Action Plans mentioned in Section 2 of this chapter. From a procedural perspective, the mainstreaming of these three human-centred pillars and spreading the application of common procedural standards, particularly the right of local communities to be informed and actively participate in climate-change adaptation planning, are desirable. Bottom-up approaches are therefore favoured, so as to reinforce the legitimacy of NAPAs while also potentially improving the effective implementation at the local level of adaptation actions financed by the climate-change institutions.

The mention of local communities suggests that climate change law does not just permit articulating a protection to the socio-economic rights of individuals. Group rights can also find some level of normative protection in preventive relocation scenarios through the climate change regime, which may not even be found in international human rights treaties.

⁹²⁶ See Chapter 2 above, Introduction.

Indeed, consideration of the rights of future generations is contemplated by the UNFCCC, whereas they have never been mentioned in the human rights framework. This point is particularly relevant for the next scenario (reactive relocation actions), as the descendants of the present generation may be deprived of the original or traditional location of their families and thereby suffer from irreversible cultural harm.⁹²⁷

All in all, we can conclude that, in preventive relocation scenarios, international human rights treaty law (in particular, the ICESCRs) is of very limited applicability in the Pacific and thus ill-suited to provide a normative basis for Pacific islanders to claim specific actions from their respective governments directed towards the preservation of their habitability conditions. Yet, the preservation of their basic survival needs, in danger of being harmed by climate change impacts, can be ensured through compliance with legal obligations under the UNFCCC and the Kyoto Protocol. The progressive incorporation of a human rights approach in the institutional practices of the climate change regime implies that some socio-economic rights of Pacific islanders are positively affected.⁹²⁸ To be sure, this by-product or 'positive externality' could be criticized for not being grounded in a concrete legal provision of the climate change regime. It is, however, compensated by the fact that the non-ratification of the most relevant international human rights instrument by Pacific Island States does not erase the obligations of all other States Parties to the Convention to co-operate in the promotion of human rights. Although such obligation is limited, it could arguably constitute (along with Article 4 of UNFCCC) a basis for Pacific islanders to claim a right to get their climate change adaptation plans financed.

4.1.2. Legal Framework in a Reactive Phase: Recognition of Housing, Land and Property Rights

Fragmented Applicability of Human Rights Instruments with Specialized Scope

Efforts to protect basic survival needs of human settlements vulnerable to climate change impacts may not be sufficient to prevent individuals or groups of persons from

⁹²⁷ International Law protects specific groups, particularly indigenous peoples, after the adoption of General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007 and the ILO Convention n° 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, which do not necessarily constitute the affected communities of the Pacific region described in Table 1. Hence, specific protection that international human rights law could have eventually given is not really relevant to the cases so far studied. Only the specific protection of the Convention against Racial Discrimination could be relevant to the Polynesian minority of the Papuan islanders, who may soon have to suffer the same fate as their neighboring Carteret Islanders and will most probably find even more obstacles to access new lands than the Carteret Islanders.

⁹²⁸ Although subject to a high level of internal implementation and effectiveness of adaptation plans and programmes, which falls outside the scope of this thesis.

displacement. In such circumstances, referred to in this chapter as the 'reactive' stage, Pacific island governments are called upon to take measures directed at the relocation of part of their respective populations to a different location falling under the government's jurisdiction or effective control. When seeking to determine the content of an international legal framework for national reactive relocation actions, the set of rights of Pacific islanders to housing, land and property (HLP rights) is undoubtedly the first call for a closer examination. As S. Leckie and C. Huggins recall, there is no single international legal instrument specifically dealing with housing, land and property rights.⁹²⁹ Thus, rather than considering them as constituting an area of specialization in international law, it is a crosscutting issue dealt with in numerous international sources of law. Some instruments recognize them as 'self-standing' human rights. Others do not single them out autonomously, but regard them as an element of the more general right to an 'adequate standard of living' (which also encompasses most of the economic, social and cultural rights referred to in the 'preventive' stage). In this context, the violation of HLP rights may thus be considered as a continuous violation of basic rights, such as the right to water, which, according to the Committee on Economic, Social and Cultural Rights' General Comment n° 15, is '*inextricably related to the right to the highest attainable standard of health (Art.12, paragraph 1) and the rights to adequate housing and adequate food (Art 11, paragraph 1)*'.⁹³⁰

Interestingly, focusing on the level of normative recognition of HLP rights in the Pacific implies in fact approaching the territorial dimension of the State, which was the object of the previous chapter, albeit from a different angle. HLP rights address the issue of 'de-territorialization', but from the perspective of the individual, which generally falls under the domain of private law in western systems. This is perhaps the point where the connection between the two challenges inspiring the titles of chapters 4 and 5 is more visibly evident: de-territorialization affects the territorial pillar of the State and, by the same token, impinges upon the HLP rights of its population. While the right to adequate housing is rather uncontroversial and can be commonly found in international instruments, land and property rights tend to remain unaffected by international law, for the land tenure and property systems of a State or government may be a reflection of its ideological disposition. In addition to this characteristic, successive waves of colonization and administration by different foreign powers in the Pacific resulted in a very complex housing, land and property systems. These are the real sources and

⁹²⁹ See S. LECKIE and C. HUGGINS, *Conflict and Housing, Land and Property Rights: a Handbook on Issues, Frameworks and Solutions*, 2011, (New York: Cambridge University Press).

⁹³⁰ CESCR, General Comment n° 15 on the Right to Water 2003, comment n° 7:

causes of the heterogeneity of reactive relocation actions depicted in section 1 of this chapter, impeding any sort of generalized legal protection scheme for the region.

Both the preventive and the reactive relocation phases share the same relevant regime of international law, albeit the rights and obligations involved differ in each relocation phase. Thus, there are five international human rights instruments relevant to reactive relocation scenarios: two general instruments – the International Covenant for Civil and Political Rights (ICCPRs) and the previously mentioned International Covenant of Economic, Social and Cultural Rights (ICESCRs); and three instruments specifically designed to protect certain groups of people – the Convention for the Elimination of All Forms of Racial Discrimination (CERD); the Convention for the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Despite the fact that the reactive phase is better suited to the design of the human rights legal framework than the prevention phase, its applicability remains, once again, subject to the ratification of the instruments in question, as summarized in Table 6, below.

TABLE 6. Ratification by Pacific Island States of Human rights Treaties Relevant to the Reactive Relocation Phase

| | ICCPR (1966) | | ICESCR (1966) | | CERD (1965) | CEDAW (1979) | | CRC (1989) |
|--------------------|--------------|--------|---------------|--------|-------------|--------------|------|------------|
| | CV | O.P. 1 | CV | O.P. | | CV | O.P. | |
| FSM | NO | NO | NO | NO | NO | YES | NO | YES |
| Fiji | NO | NO | NO | NO | YES | YES(R) | NO | YES |
| Kiribati | NO | NO | NO | NO | NO | YES | NO | YES |
| Nauru | NO | SIGNED | NO | NO | NO | NO | NO | YES |
| Marshall Is | NO | NO | NO | NO | NO | YES | NO | YES |
| Palau | NO | NO | NO | NO | NO | NO | NO | YES |
| PNG | YES | NO | YES | NO | YES | YES | NO | YES |
| Samoa | YES | NO | NO | NO | NO | YES | NO | YES |
| Solomon Is | NO | NO | YES(R) | SIGNED | YES | YES | YES | YES |
| Tonga | NO | NO | NO | NO | YES | NO | NO | YES |
| Tuvalu | NO | NO | NO | NO | NO | YES | NO | YES |
| Vanuatu | YES | NO | NO | NO | NO | YES | YES | YES |

Source: Personal Elaboration Based on United Nations Treaty Series Database⁹³¹

As explained by S. Leckie and C. Huggins, the most significant articulation of the right to housing – considered as part of the larger right to an adequate standard of living, but also as an

⁹³¹ CV = Convention; OP = Optional Protocol; R =signed with reservations.

independent and freestanding right⁹³², can be found in Article 11(1) of the ICESCRs, which provides that States Parties to the Convention '*recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.*'⁹³³ In 1991, the CESCR enumerated the seven components of such a right (including 'cultural adequacy').⁹³⁴ It also stated that the right to housing should not be interpreted in a narrow or restrictive sense, but should be read as the right to '*live somewhere in security, peace and dignity*'.⁹³⁵ Besides, although the nature of HLP rights implies that they are in principle classified in the economic, social and cultural rights basket, S. Leckie and C. Huggins note that the ICCPR – in particular Articles 4 and 17 – is increasingly being used to enforce housing rights, as homelessness is increasingly recognized as a threat factor in – or even a violation of – the right to life, while forced evictions are considered as contravening the right to be free from arbitrary or unlawful interference within the home.⁹³⁶ Despite the fact that these formal sources of law could be a useful starting point for the fulfilment of a legal protection scheme in reactive relocation scenarios of Pacific islanders, their applicability remains rather limited, given that only two States – Papua New Guinea and the Solomon Islands – have ratified the ICESCR, while three – Papua New Guinea, Vanuatu and Samoa – have ratified the ICCPR.

Nonetheless, it should be noted that HLP rights are also contained in other human rights treaties aimed at the protection of particularly vulnerable groups (minorities, women and children). Article 5(e)(iii) of the CERD expressly prohibits discrimination in the enjoyment of economic, social and cultural rights, and in particular of the right to housing, and compliance with such a provision is monitored by the United Nations Committee on the Elimination of

⁹³² S. LECKIE and C. HUGGINS, *supra*, at 60.

⁹³³ See CESCR, General Comment nº 4, 'The Right to Adequate Housing (Article 11(1) of the Covenant)', 1991, paragraph 3, which states that: '*Although a wide variety of international instruments address the different dimensions of the right to adequate housing Article 11(1) of the Covenant is **the most comprehensive and perhaps the most important of the relevant provisions.***' [Emphasis added].

⁹³⁴ *Ibid.* paragraph 7: '[T]his "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in Article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "**Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost**". [Emphasis added].

⁹³⁵ *Ibid.*

⁹³⁶ LECKIE and HUGGINS, *supra*, at 61.

Racial Discrimination.⁹³⁷ Likewise, Article 14 of the CEDAW protects the rights of rural women to adequate housing – along with sanitation, electricity, water supply, transport and communications – and compliance with such provision is monitored by the CEDAW Committee.

Although the level of ratification of the CERD is as low as the previous ‘general’ international human rights treaties (three ratifications, by Fiji, Papua New Guinea and Tonga); the CEDAW has eight Pacific Island States Parties – Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Papua New Guinea, Samoa and Tuvalu; while the CRC enjoys full ratification by Pacific Island States. To be sure, the CEDAW and the CRC do not cover the population of Pacific Island States, *as a whole*. Yet, given that the proportion of children and women in the population of the Pacific islands is high to very high, the extended applicability of the CEDAW and CRC Conventions is very important and may actually provide the core content of the legal protection scheme for reactive relocation actions in the Pacific.

Complementary ‘Soft Law’ Normative Standards?

Moreover, these meagre – yet existing – formal sources of law protecting the HLP rights of Pacific islanders, which serves as the basis for governmental policies, is complemented by non-binding human rights standards. Other than Articles 17 and 25(1) of the United National Declaration on Human Rights – which include the right to housing and property exercised individually or in association with others – most international legal literature concerned with climate-induced displacement pays special attention to the 2005 Guiding Principles on Internally Displaced People (hereafter, the Guiding Principles). This instrument sets standards analogous to those of refugee law, for cases where the displacement and relocation have taken place within the boundaries of the State. The standards contained therein serve as a guide to governments, international organizations and all other relevant actors, in providing assistance and protection to internally displaced people through identification of the rights and guarantees relevant to the different phases of displacement (that is, assistance during displacement as well as guarantees for resettlement). Although the Guiding Principles are essentially for armed-conflict contexts, they also encompass cases of internal displacement

⁹³⁷ *Ibid.* Article 5(e)(iii) of the CERD reads: ‘In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to **prohibit** and to **eliminate** racial discrimination in all its forms and to **guarantee** the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:[...] (e) economic, social and cultural rights, in particular: [...] iii) the right to housing’.

generated by 'natural disasters'.⁹³⁸ Perhaps, by having an overoptimistic and exaggerated idea of the scope of the Guiding Principles, some scholars have seen in them an important roadmap from which a legal protection (through formal or informal means) to climate-induced displaced people could and should be elaborated. For instance, Roger Zetter (former Director of the Centre for Refugee Studies, at the University of Oxford) considered that '*pending further research and consensus-building towards specific new norms or institutions*', the Guiding Principles might be seen as '*not just a starting point, but also a model for the process of aggregating and adapting the norms and principles from a wide range of international instruments to protect the rights of the 'environmentally displaced*'.⁹³⁹

Yet, the limits of this instrument and the essential differences between displacements fostered by internal armed conflict and those generated by natural disasters or any sort of environmental stress and degradation should not be underestimated. S. Leckie and C. Huggins rightly raise this point and defend the need '*for a separate set of guidelines on land and natural disasters*'.⁹⁴⁰ Indeed, concerns over HLP rights in cases of climate-induced displacement do not match post-conflict situations. More precisely, issues of repatriation, return or eviction of second occupants are not relevant in climate-induced relocation scenarios. Rather, the focus in these situations is on issues pertaining to the means and possibilities of acquisition of *new* land, as well as the safety and sustainability and cultural adequacy of, and community participation in, the relocation to such lands, along with the need to avoid discrimination of minority and gender groups in their access to the new lands.

In contrast, two other main 'soft law' instruments already existing may be better suited to serve as a model for protection of climate-induced displaced people (although the 'urgency' present in these reports does not always match the progressive nature of the deterioration of the habitability conditions due to climate change impacts): the 2006 Operational Guidelines on Human Rights and Natural Disasters,⁹⁴¹ Inter-Agency Standing Committee, as well as the 2007 UN-HABITAT, Scoping Report on 'Addressing Land Issues after Natural Disasters'.⁹⁴² This path has

⁹³⁸ See W. KÄLIN, *Guiding Principles on Internally Displaced People: Annotations*, (2008) *Studies in Transnational Legal Policy* (American Society of International Law), vol. 38

⁹³⁹ MCINERNEY-LANKFORD, DARROW and RAJAMANI, *supra*, at 64.

⁹⁴⁰ LECKIE and HUGGINS, *supra*, at 144.

⁹⁴¹ UN Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters: Operational Guidelines on Human Rights and Natural Disasters*, Brookings-Bern Project, June 2006 (Washington, D.C.: IASC); followed by the Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster, Brookings-Bern Project, Pilot version March 2008, (Washington, D.C.: IASC)

⁹⁴² D. FITZPATRICK, 'Scoping Report: Addressing Land Issues after Natural Disasters' (2007) (UN-HABITAT; United Nations Settlement Programme).

been recently taken by the Regional Office for the Pacific of the OHCHR, which organized in 2007 a regional workshop on 'Integrating Human Rights in National Disaster Management',⁹⁴³ and more recently published a report on 'Protecting HRs of Internally Displaced People by Natural Disasters: Challenges in the Pacific'.⁹⁴⁴

As opposed to the preventive relocation scenario, whereby the UNFCCC was considered as relevant to the preservation of Pacific islanders' habitability conditions, no international environmental legal instrument is relevant as a formal source of HLP rights.⁹⁴⁵ However, instead of considering it as a formal source of rights and obligations, the UNFCCC could be useful in reactive relocation scenarios as a means to enforced HLP rights and associated basic rights, particularly as an effective and reliable source of funding. This would constitute the reverse scenario to the one described for the preventive relocation phase, whereby the main formal source of law was international environmental law (due to low level of ratification of the ICESCR) and human rights approaches serve to inform the best forms of carrying out climate change obligations.

4.2. Endangered Statehood? Transnational Climate-Induced Displacements between Pacific Island States

Most climate-induced displacements currently take place within the boundaries of a State. Yet, as the deterioration of the habitability conditions of Pacific Island States becomes more stringent and the sustainability of the places within the country less exposed to climate change impacts (such as higher lands or urban centres) reached its limit, the prospects of transnational climate-induced displacements will undoubtedly be confirmed. In fact, migration of islanders (individuals or families rather than whole communities) coming from Tuvalu and

⁹⁴³ See the Regional Workshop on 'Integrating Human Rights into National Disaster Management' (9–11 May 2007), in Suva, Fiji. The purpose of this workshop was to increase the awareness and skills of UN and other staff involved in disaster-relief and recovery operations on the relevance of human rights issues in disaster management (in particular, the UN Disaster Management Team and Pacific UNDAC [UN Disaster Assessment & Co-ordination]) and develop a human rights check-list, specific to the Pacific, to be used by all concerned actors in situations of humanitarian emergencies to ensure that human rights concerns are effectively incorporated into natural-disaster preparedness, response and recovery.

⁹⁴⁴ OHCHR, 'Ratification of Human rights Treaties in the Pacific', *supra*.

⁹⁴⁵ Only Agenda 21, a non-binding legal instrument adopted at the 1992 United Nations Conference on Environment and Development, held in Rio de Janeiro, makes reference to housing, land and property lands. Chapter 7.6 recalls that the right to adequate housing is a basic human right enshrined in the Universal Declaration of Human Rights and the ICESCR and considers that access to a safe and healthy shelter is essential to a person's physical, psychological, social and economic wellbeing and should be a fundamental part of national and international action. Besides, Chapter 7.9(b) states that countries should adopt and/or strengthen national shelter strategies, while Chapter 7.30(f) provides that countries should consider developing national land-resource management plans to guide land-resources development and utilization and, to that end, establish appropriate forms of land tenure.

Kiribati – the two States with a highly reduced margin of internal relocation, due to their geographical configuration – to other island States, as well as to Australia and New Zealand, have already been documented. Table 7 shows the level of ratification of the core instruments composing the three special regimes potentially applicable in cases of transnational climate-related relocations. Firstly, the relevance and applicability of refugee law – consisting of the 1951 Convention on the Status of Refugees and its 1967 Protocol – and international migration law – essentially consisting of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – will be dealt with in scenarios of partial de-population. Then, as the possible extinction of some Pacific islands' statehood following total de-population and de-territorialization is anticipated, the regime on statelessness may become relevant.

Transnational climate-induced relocations bear two additional elements of complexity. Firstly, by definition, transnational relocations imply a plurality of possible 'duty bearers', as the territoriality and jurisdiction of at least two States – the State of origin and the State of arrival (hereafter referred to as the 'host' State) – are involved. The movement of the individual leaving his/her country of citizenship to enter another State and become part of the shadowy category of 'alien' is viewed by international law as a transition towards a situation of increased weakness and potential defencelessness. Thus, the focus of international legal regimes relevant to international migration cases is primarily on the treatment that the alien residence-seeker (whether migrant worker or statutory refugee) receives on entering and eventually settling in a territory subject to the jurisdiction of a State that is new to the migrant. The State of origin is somehow left behind by international law, which accompanies the migrant from the moment of departure, closely follows his/her steps until the point of arrival and then remains vigilant of the treatment received thereafter under the jurisdiction of the host State.⁹⁴⁶ Whereas such a 'behavioural characteristic' of the international legal order does not conflict with partial depopulation scenarios, it makes it very ill-fitted, and this calls for thorough re-examination as the prospects of total depopulation scenarios are anticipated. The second source of complexity lies in the characterization of the overall context in which climate-related displacements take place, since these are so much akin to situations of conflict that an extension of the regulation could be justified. Such debate informs the applicability of many of the international legal regimes relevant to cases of transnational climate-related relocations, which depends not only

⁹⁴⁶ The idea that the State of origin is ignored by international law once the refugee has crossed the border is nevertheless subject to the exception of the right of return. See E. HADDAD, 'The Refugee: the Individual between Sovereigns', (2003) *Global Society*, vol. 17, pp. 297-232.

on the ratification rate of the countries concerned, but also on the conceptual definitions that raise controversy both from a legal and a policy perspective.

TABLE 7. Ratification by Pacific States (including Australia and New Zealand) of International Treaties Relevant to Transnational Depopulation Scenarios

| | Refugee Status | | Statelessness | | Migrant Workers |
|---------------------|----------------|----------|---------------|--------------|-----------------|
| | CV | Protocol | Status CV | Reduction CV | |
| Australia | YES | YES (D) | YES | YES | NO |
| Cook Islands | NO | NO | NO | NO | NO |
| FSM | NO | NO | NO | NO | NO |
| Fiji | YES (R) | YES | YES (R) | NO | NO |
| Kiribati | NO | NO | YES (R) | YES | NO |
| New Zealand | YES (R) | YES | NO | YES | NO |
| Nauru | YES | YES | NO | NO | NO |
| Marshall Is. | NO | NO | NO | NO | NO |
| Palau | NO | NO | NO | NO | SIGNED |
| PNG | YES (R) | YES | NO | NO | NO |
| Samoa | YES | YES | NO | NO | NO |
| Solomon Is. | YES | YES | NO | NO | NO |
| Tonga | NO | NO | NO | NO | NO |
| Tuvalu | YES (R) | YES | NO | NO | NO |
| Vanuatu | NO | NO | NO | NO | NO |

4.2.1. Legal Framework for Ongoing Partial De-population Scenarios: International Refugee and Migration Law and Complementary Human rights Treaty Law

International Refugee Law and International Migration Law: Searching for a Legal Status to Access and Settle in a Foreign State

Migration issues have traditionally been subject to the discretionary power of sovereign entities, and States are in principle free to decide on the conditions of entry and residence of aliens in their territory. Yet, for humanitarian purposes, international law, under certain circumstances, limits this discretionary margin of appreciation.⁹⁴⁷ Refugee law constitutes the most stringent curtailment of a State's sovereign power over migration issues, and offers the most comprehensive quality of protection that the refugee regime can afford in

⁹⁴⁷ McADAM, *International Law, Forced Migration and Climate Change*, *supra*.

terms of certitude, scope and level of rights afforded to its beneficiaries.⁹⁴⁸ Being aware of this fact, international scholars quickly examined its possible applicability to situations of climate-related displacement.⁹⁴⁹ Thus, its relevance for climate-displaced Pacific islanders merits examination.

Refugee law comes into play when the State of origin is unable or unwilling to offer protection to its population,⁹⁵⁰ which correlatively implies that the responsibility of the host State towards an asylum seeker is engaged. As Thomas Gammeltoft-Hansen puts it, '*the refugee is poised squarely between these two conceptions of sovereignty: sovereignty as freedom and sovereignty as responsibility*',⁹⁵¹ the biggest expression and justification of such limitation of sovereign powers being embodied in the principle of *non-refoulement* recognized in Article 33 of the Refugee Convention. Although the refugee status is only declaratory and not constitutive – thereby offering a certain level of control by the host State – Article 33 implies that, once the refugee status has been granted to the asylum seeker, the host State has the obligation not to return the alien to his/her State of origin. Such a curtailment of the host State's discretionary power is nevertheless 'compensated' by a set of strict conditions necessary to the granting of refugee status (in particular, the need to prove the threat of individual persecution by the State of origin),⁹⁵² and justified by the humanitarian context and purpose that underlie the regime. The principle of *non-refoulement* would undoubtedly offer an important advantage to climate-displaced people, as their permanence in the territory of the host State would be protected from any eventual changes in migration policy, and yet the right to return to their State of origin – if habitable at all – remains formally preserved. Also, once the refugee status is granted and the right not to be returned to the State of origin is engaged, a wider set of socio-economic, civil and political rights to refugees associated with the living conditions in the host State comes into play. Such a set of rights is granted 'en bloc' along with the status of refugee, but the enjoyment of this status by the beneficiaries depends on the

⁹⁴⁸ GAMMELTOFT-HANSEN, *Access to Asylum: International Refugee Law and the Globalization of State Control*, 2012 (Cambridge, UK: Cambridge University Press), at 30, who refers to the existence of a 'protection lite', different from other standards with 'the presence of formal protection but with lower degree of certainty about the scope and/or level of rights afforded'.

⁹⁴⁹ McADAM, *International Law, Forced Migration and Climate Change*, *supra*, chapter 2.

⁹⁵⁰ GAMMELTOFT-HANSEN, *supra*.

⁹⁵¹ *Ibid.*

⁹⁵² See Section 3.1 of this chapter above. Conditions have been interpreted more strictly by national tribunals, particularly after the end of the Cold War.

level of attachment a refugee demonstrates to a given country.⁹⁵³ Thus, 'durable residents' enjoy more sophisticated civil and political rights and may have better access to social benefits than others.⁹⁵⁴ The right to adequate housing, provided for in Article 21 of the Refugee Convention, entails an obligation for States Parties to accord refugees lawfully staying within their territories treatment '*as favorable as possible*' along with a non-discrimination rule as, in any event, such treatment shall not be '*less favorable than that accorded to aliens generally in the same circumstances*'. As all these potential benefits the refugee regime could offer to climate-displaced people are laid down, the question that arises is whether the regime is applicable in the Pacific, both from a geographical and a material perspective.

Table 7 shows that both the Refugee Convention and its Protocol have been ratified by six Pacific Island States – Fiji, Papua New Guinea, Tuvalu, Nauru, Samoa and the Solomon Islands – which is a rather high ratification rate when compared with the level of ratification of human rights treaties in general (ICESCRs and the ICCPR) dealt with above. Yet, given that the refugee regime is solely concerned with aliens and not a State's own subjects, such a fact is not meaningful per se. The only relevant ratification to be considered is that of potential host States, rather than the Pacific Island States of origin, such as Tuvalu or Kiribati.⁹⁵⁵ The crucial point therefore is that the two regional powers and main potential host States of climate-displaced islanders, Australia and New Zealand, have also ratified the Refugee Convention and its Protocol.

Yet, the unproblematic geographical applicability of international refugee law in the most relevant countries of the Pacific contrasts with the highly controversial extension of the Convention's material scope to cover cases of climate-related displacement. To be sure, the traditional paradigm of refugee law is currently challenged by new factual realities that have transformed the 'asylum-seeking experience'. T. Gammeltoft-Hansen has, for instance, dedicated a thorough study to the measures of migration control set up before arrival in the host State and often carried out by private actors, and questions whether such a shift in location and actors for the encounter between the refugee and the host State is accompanied by an equal *de jure* shift in the scope of international refugee law.⁹⁵⁶ Climate-related

⁹⁵³ T. GAMMELTOFT-HANSEN, *supra*, at 28, who explains that '*this incremental approach reflects a seemingly sensible concern of the drafters not to extend the full scope of rights immediately in situations where refugees may arrive spontaneously in large numbers*'.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ *Ibid.*, at 25, who explains that refugee law is 'international' in so far as '*refugee protection is not guaranteed in a global homogeneous juridical space, but materializes as a patchwork of commitments undertaken by individual states tied together by multilateral treaty agreements*'.

⁹⁵⁶ *Ibid.*, at 231, cases referred to by this author as 'offshore and outsourcing migration'.

displacement equally challenges the refugee regime – for instance, by promoting rather forced re-examinations of the boundaries of the persecution criterion and questioning the relevance of the regime in cases of mass influxes – to such an extent that it leads to the rather useless definitional impasse already detailed in section 3.1 of this chapter. As a result, Australian and New Zealand courts have consistently denied the refugee status to Tuvaluans and I-Kiribati who claimed to be ‘climate refugees’. In fact, as J. McAdam points out, not even the existence of a special category of ‘environmentally displaced people’ has so far been acknowledged by national judges of the two regional powers.⁹⁵⁷ Thus, the direct applicability of the Refugee Convention does not seem possible – at least in partial de-population scenarios – although, as Jane McAdam rightly suggests, some of the ‘conceptual constructs’ of the refugee regime may be usefully transposed to a future regulation of climate-related displacement.⁹⁵⁸

Considering the difficult applicability of the refugee regime to cases of climate-related displacement in the Pacific – particularly due to the lack of fulfilment of the ‘persecution criterion’ – international migration law appears as the second alternative international regime limiting the freedom of States to decide migration issues within their territory and possibly applicable to climate-related displacement of Pacific islanders. The first advantage of relying on this regime is that it seemingly matches the will of Pacific islanders and of their authorities to avoid the victimization and degrading effect of being labelled as ‘refugees’. President Anote Tong’s declaration, reproduced in the chapeau to the present chapter, is a striking and clear expression of this apprehension.⁹⁵⁹ Moreover, it is also consistent with the policy practice already existing in the region, whereby several working migration schemes already detailed in Section 2.2 of this chapter – such as the New Zealand Pacific Access Category or the Australian Pacific Immigration Scheme – have been agreed between the regional powers and Tuvalu, Kiribati and Tonga.⁹⁶⁰

The general preference of Pacific islanders’ themselves to be considered under the general

⁹⁵⁷ See, for instance, New Zealand and Australian cases where claimant’s demand to receive refugee protection for climate-change impacts was rejected. New Zealand cases: Refugee Appeal 72719/2001, RSAA (17 September 2001) – (Tuvaluan claimant); Refugee Appeal 72313/2000, RSAA (19 October 2000) – (Tuvaluan claimant); Refugee Appeal 72314/2000, RSAA (19 October 2000) – (Tuvaluan claimant); Australian cases: 10004726[2010] RRTA 845 (30 September 2010) – (Tongan claimant); 0907346 [2009] RRTA 1168 (10 December 2009) – (I-Kiribati claimant); N00/34089 [2000] RRTA 1052 (17 November 2000) – (Tuvaluan claimant). All cited in J. McAdam, *Climate Change, Forced Displacement and International Law*, *supra*, footnote n^o43, at 47.

⁹⁵⁸ In particular, refugee law recognizes anticipatory flight (fear must be plausible and reasonable according to jurisprudence).

⁹⁵⁹ The ‘denial’ approach to the scope of climate change impacts and its real jeopardizing effects on the survival of Tuvalu’s statehood is stressed in F. GEMENNE and S. SHEN, *supra*.

⁹⁶⁰ See Section 2 of this Chapter above.

category of economic migrant workers, coupled with the existing regional State practice, raises the question of whether they could benefit from the formal protection offered by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. While this instrument does not facilitate the access to the territory of host States, as the Refugee Convention does, it nonetheless sets minimum standards on the treatment that immigrant workers have the right to receive once they have been granted working and residence (whether temporary or permanent) permits by the host State. Article 43(1) of the Migrant Workers Convention, for instance, declares the right of all migrant workers to equality of treatment with nationals of the State of employment in relation to basic socio-economic rights, such as access to housing – including social schemes – and protection against exploitation in respect of rents. Unfortunately, the Convention does not serve as a formal source of such rights, for it has not been ratified by any State of the Pacific, including the two regional powers.⁹⁶¹ Therefore, other than the eventual possible applicability of specialized Conventions of the International Labour Organization, which generally have a low level of ratification,⁹⁶² the treatment and conditions of entry of Pacific islanders and workers into Australia and New Zealand (as well as in other Pacific Island States less threatened by climate change impacts) largely depends on these State's public statutory and case law.

Complementary Role of Human Rights Treaty Law: Ensuring Basic Rights and Minimum Standards during and after Settlement in the Host State

In spite of the limited applicability of international refugee law from a material perspective and of international migration law from a geographical perspective, as possible formal sources of rights of climate-related displaced Pacific islanders, human rights treaty law remains valid as a general and complementary relevant regime. First, there is the doctrinal movement in favour of reconceiving or reconsidering international refugee law as a specialized area within the realm of human rights.⁹⁶³ Such a move would imply a return of the focus on the State of origin, generally absent in the refugee regime, as already pointed out above. It involves the extension of protection obligations to States without a territorial link with the refugee, in particular with the State of origin, to end 'persecution', and to potential aid donors for providing support to

⁹⁶¹ As shown in Table 6, only Palau has signed the Migrant Workers Convention.

⁹⁶² The only example of a relevant ILO convention could be the 1958 ILO Convention n° 110, Concerning Plantations, Article 88(1) of which establishes that, where housing is provided by the employer, the conditions under which plantation workers are entitled to occupancy shall be not less favorable than those established by national custom or national legislation.

⁹⁶³ See for instance J. HATHAWAY, *The Rights of Refugees under International Law*, 2005, (Cambridge, UK: Cambridge University Press).

the host States.⁹⁶⁴ Secondly, irrespective of whether such a path is followed or not, the geographical applicability of the two human rights covenants in Australia and New Zealand – although still very poorly ratified by Pacific Island States – could serve as a source of general socio-economic rights and family rights for Pacific islanders and their families settled and/or working in these two regional powers, such as the right of the family unit. Regarding the State of origin – and although the obligation to stop persecution would not be applicable in this case – the docket of climate-displaced peoples' rights could include the conventional right of free movement of its population – implying the right to travel and have access to appropriate travel documents⁹⁶⁵ – and, most importantly, the right to return, for citizens as well as stateless aliens with a long-term residence attachment to the State, which is generally being recognized as a customary international rule.

4.2.2. Legal Framework for Prospective Total De-population Scenarios: From Homelessness to Statelessness?

The scenario whereby the whole population of a State affected by climate change impacts relocates elsewhere is nowadays only a projection. Yet, since the speech delivered in 2008 by the former President of the Maldives, in which he announced the creation of a public fund from tourist revenues which would finance the purchase of lands in neighbouring countries, so as to resettle all its population abroad, it became a solid a paradigm of the real challenge that low-lying developing island States are facing in a relatively short time span. After its inception in the Indian Ocean, the idea that such a bad dream is slowly becoming a reality also reached the Pacific. Recently, the media spread the news that Kiribati's President, Anote Tong, was conducting negotiations with Fijian private landowners for the purchase of land in Viti Levu (Fiji's main island). Although anticipated, and to some extent imagined, it is essential to note how such a scenario would affect the legal protection scheme of transnational climate-related displacements set out above.

The main consequence of the total de-population of a State is that it implies turning the focus of attention back to the State of origin. As previously indicated, the existence of the State of origin in international refugee law, international migration law and international human rights law is presumed. Thus, while the State of origin is not the focus of normative attention

⁹⁶⁴ T. GAMMELTOFT-HANSEN, *supra*.

⁹⁶⁵ The right of free movement includes the right to travel and have access to appropriate travel documents and is bound by a non-discrimination rule, yet can be limited on grounds of national security, public order, public health or morals and protection of rights and freedoms of others.

under these three regimes, its presence is taken for granted and has an impact on some of the core obligations of the host State – such as the obligation of ‘non-refoulement’. However, the total de-population of a Pacific island State significantly threatens the continuation of its Statehood. The extinction of the State could indeed occur at two different moments. The first moment would be before total submergence of the territory, that is, when the whole population leaves the inhabitable territory falling under the jurisdiction or effective control of the State in question. In this case, while the two ‘material elements of the State’ still exist and are tangible, the physical link between the population of a State and its territory would be broken. As previously indicated in Chapter 4, the continuation of the State in this scenario would depend on the recognition that the total de-population of a State does not imply its disappearance, but that it constitutes a ‘population (and government) in exile’. The second moment would presumably arise at a later stage, after total submergence of the territory. The continuation of the State in this case would involve the recognition or creation of a legal construct (akin to the Holy See or the Order of Malta, ‘non-State sovereign entities’). As these are facts that do not have real precedents in international law, the means by which the situation is resolved and the status of the endangered Pacific islands both fall outside the realm of law. Irrespective of the undeniable impact that the disappearance of a material element of a State would have on the continuation of its statehood, the fate of the State in both cases remains an outstanding issue that is, after all, resolved by political and informal – rather than legal and formal – elements of the international community. As will be seen in chapter 6, the capacity of the State at stake to defend its situation in international fora will possibly have an impact on how the international society resolves this issue.

Although the issue remains outstanding, in the event that the statehood of the country of origin is considered extinct, the migrants in question would not be refugees or economic migrant workers, but potentially stateless people. Such an important change of status correlatively implies a set of obligations not only of the host State, but also of the international community as a whole and of certain international agencies. The Convention on the Status of Stateless Persons is therefore a potential avenue for prospective climate-related displaced people, which has been ratified by Kiribati and Australia (New Zealand ratified the Protocol on the Reduction of Statelessness).

As the question of the continuation of statehood is raised, and its relation to the treatment and legal protection of its displaced population established, the shift from an individual (or family-community) towards a collective level of analysis seems necessary. Literature on peoples’ rights exploded in the 1970s and 1980s, as the right of peoples to self-determination

found a real framework of development.⁹⁶⁶ As the right to self-determination, understood collectively, was at the onset of the creation of what David Hume named 'progressive nationalism' of peoples fighting for freedom from colonization or administration by foreign powers, it becomes most relevant when the continuation of the same State is threatened. Arguably, a plea could be made in favour of considering that the collective right of survival of Pacific Island States that become totally de-populated is nothing but the ultimate – and perhaps capital – form of reaction against the post-modern forms of developed countries' imperialism.

5. CONCLUSIONS

Closely connected with the looming de-territorialization described in Chapter 4, above, the primary manifestation of climate change impacts on the human dimension of Pacific Island States is the decrease of the habitability conditions of Pacific islanders. The paradigm reaction to the acute environmental stress suffered by the population of Pacific Island States is their displacement and consequent relocation to a different place where their basic survival needs may be met. Although such reaction seems, *prima facie*, the most common ultimate form of adaptation, with several previous examples in world history, the closer look at cases of accomplished relocation in the south-west Pacific taken in the present chapter has unveiled both the fundamental differences as well as the underlying complexities accompanying such a process in this specific region. First, actions conducted in the region seeking to preserve the habitability conditions of Pacific islanders, so as to *prevent* their resettlement, are rather similar and homogeneous among Pacific Island States, given that these governmental actions are organized, co-ordinated and even financed at a regional level and are closely linked to implementation measures stemming from the international regime on climate change and from international action on disaster risk-reduction. In contrast, when the display of such a range of preventive relocation actions cannot guarantee the maintenance of basic survival needs of the population, and Pacific islanders are forced to move, actions seeking to *react* to relocation scenarios differ widely from country to country and offer a highly heterogeneous landscape. These differences flourish as a result of socio-cultural, political and geographical factors encompassing, inter alia, the divergent levels of effective presence of the national government in their respective population's daily life, the complexity of land-tenure systems, or the differences between relocations that remain within an agricultural setting from relocations

⁹⁶⁶ See Chapter 6, Section 4.2.2

implying the move to an urban (and often already overpopulated) setting.

As these root differences are unveiled, a critical approach to how climate-induced displacement has so far been dealt with in international legal scholarship becomes necessary. Although, in general, existing studies rightly diagnose the legal challenges – namely, the scarcity and inappropriateness of the existing legal instruments and institutions – the solutions proposed to overcome such challenges – creation of new legal instruments, development of existing instruments and institutions or inter-regime linkages – are either ill-suited or insufficient to address the inherent complexities of climate-induced displacement in the south-west Pacific previously revealed. These are somehow top-down ‘universalist’ responses that do not respond to the existing real heterogeneity. Besides, and most importantly, the proposals made so far do not take into account the wider contextual variable in which relocations take place, and thus neglect or disregard the issue of the continuation of the State and how such an unresolved matter may greatly affect the responses to the problem of climate-induced displacements.

As a result, this chapter has suggested a new framework for understanding and tackling the issue of climate-induced displacement, one that encompasses all stages of a relocation (both the prevention and reactive phases), distinguishes between relocation taking place at a national level from cross-border resettlements and, in doing so, relocates the issue within its wider context by associating it with the unresolved question of whether the continuation of the State in question may or may not be at stake. This question is in fact the real axis structuring the proposal to deal with climate-induced displacement through a multilayered legal protection scheme, and essentially highlights the fact that the fate of Pacific islanders and the eventual legal protection they may have cannot be detached from the fate of their State of origin. Then, when called upon to fill each stage of the multilayered legal protection scheme with concrete rights, some of the proposals most recurrently upheld in international legal scholarship also appear to be useless in this region. In cases of national displacements – which do not jeopardize the continuation of the State – the applicability of human rights treaty law is very limited, due to the low level of ratification of the ICESCR in this region. Yet, the development of a human rights approach may positively inform the implementation of international environmental legal instruments – in particular of the UNFCCC, which has been ratified by all Pacific Island States. National relocation in the reactive phase fundamentally alludes to the level of guarantee or protection of housing, land and property rights which – apart from being quite poorly recognized in international human rights treaty law – are mostly ruled by traditional customary systems that may generate significant obstacles for climate-

induced displaced people to have access to new lands. On the one hand, in these cases, the housing, land and property rights of some minority groups (ethnic minorities, women and children) – may be covered by specialized human rights treaties which count with a higher level of ratification than the general instruments (ICESCR and the ICCPR). On the other hand, informal instruments, such as the Guiding Principles on Internally Displaced Peoples, despite serving as an appropriate road map for future normative developments, are nevertheless not well suited to respond to displacements due to environmental – as opposed to conflict – causes. In cases of transnational relocations – which constitute the real looming threat to the continuation of Pacific island statehood – difficulties arise out of the multiplicity of relevant States involved (at least including the State of origin and the host State). Given that the moment in which the population of a State and its territory becomes formally discontinued is not settled, this chapter has differentiated between two main situations. In cases of partial de-population, the applicability of refugee law to climate-induced displaced people has not been so far accepted by the national courts of the two potential host countries of the region – Australia and New Zealand; international migration treaty law, whose material scope of application is less specialized than that of the refugee regime, is yet not applicable in the region, given the lack of ratification. Finally, the prospects of having to deal with total de-population scenarios of Pacific Island States (before the total de-territorialization actually takes place) has shown that, ultimately, the content of this multilayered legal protection scheme cannot, in these cases, be fixed or defined as long as the contextual issue – namely, whether and when the State becomes extinct – is resolved. The determination of the fate of the State challenged by high rates of, or total, de-population is a *prerequisite* of the determination of the eventual rights that climate-displaced people may have. Yet, the answer to this question lies outside the realm of law and forces us to come back to the blurred and slippery boundaries between international law and international life.

Yet, despite the fact that this fundamental and structural question remains outstanding, one thing can be set clear. In all stages and scenarios covered by the multilayered legal protection scheme, the action and presence of the political dimension of the State is fundamental, for it is the government that organizes and finances preventive and, in some cases, reactive relocation actions; and it is also the government that is tasked with negotiating migration agreements with other countries, providing its citizens with travel documents, purchasing land in other countries and, ultimately, as detailed in Part I of this thesis, raising its voice and defending its cause before the international community. Hence, as the protection of the human dimension of the State is necessarily ensured by its political dimension, chapter 6

will finally be devoted to the effects of climate change impacts on the governmental capacity of Pacific Island States and the correlative power this dimension may have for the defence of the continuation of their statehood.

CHAPTER 6

CLIMATE CHANGE IMPACTS AND PACIFIC ISLANDS' GOVERNMENTAL CAPACITY: FIGHTING FOR THE CONTINUATION OF STATEHOOD THROUGH POLITICAL ACTION?

1. INTRODUCTION

2. THE 'INDOORS CHALLENGE': IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLAND STATES' GOVERNMENTAL CAPACITY

2.1. Limited Governmental Response Capacity to Scenarios of Partial De-territorialization and De-population: From 'Vulnerable' to 'Failed' States'?

2.1.1. 'Failing', 'Failed' or 'Collapsed' States: Controversial Labels Challenging Formal Sovereign Equality

2.1.2. From 'Failed States' to Extinction of Statehood: The Big Gap

2.2 Scenarios of Total De-territorialization and De-population: Pacific Island Governments in Exile?

2.2.1. Governments in Exile: An Uncontroverted Concept in International Law

2.2.2. The Real Threat to the Continuation of Pacific Island States: Conjunction of the Challenges to the Three Dimensions of Statehood

3. THE 'OUTDOORS CHALLENGE': IMPACT OF CLIMATE CHANGE ON PACIFIC ISLANDS' CAPACITY TO MAINTAIN INTERNATIONAL RELATIONS

3.1. Pacific Island States in the International Community

3.1.1. Contrasting Faces: Limited National Governmental Capacity vs. Active Participation in International Life

3.1.2. Back to the Climate Change and International Security Discourse: A Prelude to Pacific Island States' Claim to Their Own Continuation?

3.2 The International Community and Pacific Island States

3.2.1. Past Structural Transformations of the International Community: Their Reflection in the Creation of Pacific Island States

3.2.2. Present Looming Transformations of the International Community: A Reflection in the Treatment of Pacific Island States' Challenges to the Continuation of Statehood?

4. A PLEA FOR THE CONTINUATION OF PACIFIC ISLANDS' STATEHOOD: LEGAL AND ETHICAL GROUNDS

4.1. Legally Based Avenues: State Responsibility and Liability for Climate-Change Damage

4.1.1. Duty to Prevent, and Compensation for, Transboundary Air Pollution: A Principal Remedy for Climate-Change Damage

4.1.2. Maintenance of the Recognition of Pacific Islands' Statehood: A Subsidiary Remedy for Climate Change Damage?

4.2. Ethically Based Avenues: Exploring and Contextualizing Streams of Environmental Justice

4.2.1. The Threat to Pacific Islands' Statehood: A Global, Southern and Post-Colonial Issue

4.2.2. The Turn to the Peoples: The Future of Pacific Islands' Statehood in the Light of Pacific Islanders' Right to Self-Determination?

5. CONCLUSIONS

'A remarkable feature of modern developments in the region of international law is an altogether novel tendency to regard nations as permanent and indestructible entities. As this does not usually correspond with facts, widespread friction and quarrels necessarily ensue. [T]he theoretical possibility of its [the State's] depopulation or the total loss of its territory is hardly even of academic interest, but the loss of an effective government is altogether a different matter.'
Tomas Baty, *International Law in Twilight*, 1933.

'Throughout its history, the development of international law has been influenced by the requirements of international life'
International Court of Justice, *Reparations case*, 1949.

1. INTRODUCTION

Both the geographical and human dimensions of the State which have been made the object of study of the two preceding chapters may be seen as the paramount 'material substratum' of the State. As the metaphysical or immaterial State has not (yet) seen the light of day, territory and population clearly and prominently reveal how the State, as a political concept, nonetheless requires the existence of a physical basis through which such a concept can be materialized.⁹⁶⁷ The political dimension of the State, embodied in its government, is generally referred to as the third material criterion of statehood. It is also one with the potential to eclipse all other dimensions, as, for instance, Rosalyn Higgins (omitting any reference to the territory and population) considered that *'if it is States who are leading actors, they find their physical manifestation in governments'*.⁹⁶⁸ And indeed, there is a determinant quality of governments derived from the fact that States, as juridical persons, must *act* through organs.⁹⁶⁹ On the one hand, in the international sphere, governments are the agencies with exclusive and plenary competence to represent their respective States vis-à-vis other States or international organizations, irrespective of whether they are governments in situ or in exile.⁹⁷⁰ On the other hand, when it comes to a State's 'indoors' action, governments

⁹⁶⁷ This argument does not amount to an organic theory of the State (generally found in geopolitical studies), but simply seeks to point out the fact that the metaphysical State has not (yet) appeared as one of the possible expressions of statehood.

⁹⁶⁸ R. HIGGINS, *Problems and Process: International Law and How We Use It*, 1994 (Oxford: Clarendon Press), at 42.

⁹⁶⁹ *German Settlers in Poland*, (1923), Permanent Court of International Justice, Ser. B, n° 6, 1 at 22, cited in S. TALMON, *Recognition of Governments in International Law (with Particular Reference to Governments in Exile)*, 1998, (Oxford: Clarendon Press), at 115.

⁹⁷⁰ *Ibid.*

are the engine and agency through which the State's ruling power over its population and territory or its competences therein are displayed.

Yet, the political dimension of the State does not simply refer to governments from the standpoint of the functional role they play; an additional element is encompassed in this dimension, which is what makes it distinct from the geographical and human dimensions of the State. Indeed, while serving as the material agency through which a State's action operates indoors and outdoors, governments are also the depositories of the distinctive attribute of the State, namely, its sovereignty.⁹⁷¹ Therefore, the political dimension of the State plays a particularly fundamental role vis-à-vis the other two dimensions; as the vehicle of sovereignty, the geographical and human dimensions are joined under a unifying umbrella so as to become part of the statist structure which, were it not for this distinctive attribute, would have simply constituted a decentralized territorial entity.⁹⁷² From the fact that the political dimension of the State encompasses not only the organ through which the State acts, but also the quality enabling its differentiation from other forms of political organization, it follows that this dimension conflicts with, and necessarily leads to, incursions into the realm of power. Indeed, to begin with, sovereignty as a legal concept can be commonly defined as the 'supreme power' which, as Jean Salmon explains, is distinct from independence or political and economic power and applies equally to all States from the moment they acquire such a '*statut étatique*', irrespective of the scope of their territory, the importance of their population, the form and nature of their government, or their autonomy or independence from third States.⁹⁷³ Norberto Bobbio further specifies that, although sovereignty does not exhaust power, it does capture the most significant and potentially dangerous form of concentration of power.⁹⁷⁴ Among the countless definitions of sovereignty that may be found in international legal scholarship, political theory and international relations, the one that best crystallizes this idea may be Carl Schmitt's. In the words of this modern (also highly controversial) German philosopher, 'sovereign is he who decides on the exception' (understanding the exception as referring to a

⁹⁷¹ The expression 'depositories' is borrowed from S. TALMON, *supra*, at 16.

⁹⁷² J. SALMON, 'Quelle place pour l'État dans le Droit international d'aujourd'hui?', (2010) *Recueil des Cours de l'Académie de Droit international de La Haye*, vol. 347, at 21.

⁹⁷³ *Ibid.*, at 55 [my own translation]. The original version in French defines sovereignty as '*un concept juridique distinct de l'indépendance ou du pouvoir politique et économique. C'est un concept juridique qui s'applique de manière égale à tous les États à partir du moment où ils accèdent au statut étatique, quelle que soit la superficie de leur territoire, l'importance de leur population, la forme et la nature de leur gouvernement, leur autonomie ou leur indépendance économique ou politique à l'égard d'États tiers.*'

⁹⁷⁴ N. BOBBIO, N. MATTEUCI y G. PASQUINO (dir.), *Diccionario de Política*, 2008, (Méjico DF: Siglo XXI), vol. 2, pp. 1215-1225, at 1218.

general concept belonging to the theory of State and not merely as a construct applied to states of emergency or siege).⁹⁷⁵ The exception, Schmitt continues, '*is not codified in the existing legal order*,⁹⁷⁶ and can at best be characterized as a situation of '*extreme peril, a danger to the **existence** of the State*',⁹⁷⁷ or the like. It is thus in the essence of sovereignty to be a borderline (as opposed to a vague) concept, although such a condition is precisely what '*makes relevant the whole question of sovereignty*'.⁹⁷⁸

Furthermore, by linking the definition of sovereignty with the extreme situations in which the continuation of the State is at stake, Carl Schmitt's definition is also a reminder of how sovereignty operated as a fundamental conceptual basis of the modern State. Indeed, it is nowadays generally admitted that, since the birth of the modern European State, the concept of sovereignty cannot be dissociated from the concept of State (notwithstanding the special cases of the Holy See and the Order of Malta previously mentioned in Chapter 4, above).⁹⁷⁹ Correlatively, the idea of sovereignty was nurtured by the internal sphere of the State, where it finds its conceptual roots and origin, while in its external dimension, it developed as a limit to the scope of the respective sovereign powers of other States.⁹⁸⁰ Both the internal and external aspects of sovereignty – inextricably bound to the State's national and international political dimensions – are found in Article 1 of the Montevideo Convention, which establishes that, for a political entity to acquire statehood, it must have, inter alia, a 'government'⁹⁸¹ and 'the capacity to enter into relations with other States'.⁹⁸²

This final Chapter considers the effects of climate change impacts on the political dimension of Pacific Island States, a task which appears to be tricky and complex, for two main reasons. First of all, such a consideration entails a high risk of being trapped in a circular dynamic, given that, exploring the impacts of climate change on the capacity of Pacific island

⁹⁷⁵ C. SCHMITT, *Political Theology: Four Chapters on the Concept of Sovereignty*, (translation by George SCHWAB), 1985, (Chicago: University of Chicago Press), at 5.

⁹⁷⁶ *Ibid.*, at 6.

⁹⁷⁷ *Ibid.* [Emphasis added].

⁹⁷⁸ *Ibid.*, at 6. Then, he states that '*a jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty*', at 12, and continues by quoting Søren Kierkegaard's work *Repetition*, who wrote that '*the exception explains the general and the self. And if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general*', at 15.

⁹⁷⁹ See for instance J. SALMON (dir.), *Dictionnaire de Droit international public*, 2001, (Bruxelles: Bruylant): '*la souveraineté expiré la puissance suprême (suprema potestas) de gouverner, de commander et de décider et qui, liée à l'apparition de l'État moderne, est inseparable de celui-ci*', cited in SALMON, *supra*, at 21. [Emphasis added].

⁹⁸⁰ BOBBIO, *supra*, at 1221.

⁹⁸¹ Montevideo Convention, *supra*, Article 1(c).

⁹⁸² *Ibid.*, Article 1(d).

governments to fulfil their role, implies tackling – at least indirectly – the question of how has Pacific Island States' sovereignty been affected by climate change impacts, which in turn leads to questioning the scope of such effects on the continuation of Pacific Island States statehood (particularly when coupled with the range of disruptions present in the geographical and human dimensions of the State analysed in Chapters 4 and 5), despite the fact that, as S. Talmon recalls, '*the government, as an organ of the State, by definition requires the existence of a State*'.⁹⁸³ It is therefore difficult to evaluate whether and, eventually, when the adverse effects of climate change on the governmental capacity of Pacific Island States may endanger their statehood and whether or not they may reach such a qualitative and/or quantitative threshold. Secondly, associating the concept of sovereignty, understood as a supreme power, with the politically weak, economically vulnerable and environmentally threatened Pacific Island States may seem a bit far-fetched or disconnected from their reality in the international sphere.

Taking into consideration these two difficulties, the question raised in this Chapter is two-fold: **how may the adverse impacts of climate change challenge the governmental capacities of Pacific Island States? And how may the active participation of Pacific Island States in the international sphere operate as a determining variable of the question of their continuation as States?** Part II of this Chapter begins with consideration of the challenge that climate change impacts may not affect the objective and material existence of Pacific islands' governments, but the capacity of these governments to operate as 'effective' organs of the State, and considers whether they may be challenged by the 'failed States' doctrine or by the possibility of the States having their governments evacuated from their respective territories. Part III explores the role of Pacific Island States' actions as players in the international community, with particular emphasis on their position regarding the threat to their survival as States, as encapsulated in the Climate Change and International Security Discourse, and argues that such a position is not irrelevant to the solution to their situation. Correlatively, this Part recalls the involvement that the international community has had in the acquisition and sustainability of Pacific islands' statehood, and thus reveals that the question of whether or not the continuation of Pacific islands' statehood cannot be resolved from a legal standpoint, but depends on the political decision of the international community to maintain recognition of Pacific Island States. To set this position on more substantial grounds than the merely practical, Part IV argues that the continuation of Pacific islands' statehood even beyond its

⁹⁸³ S. TALMON, *supra*, at 15.

‘material life’, through maintenance (at least temporarily) of international recognition, can be based on both ethical and legal grounds.

2. THE INDOORS CHALLENGE: IMPACTS OF CLIMATE CHANGE ON PACIFIC ISLAND STATES’ GOVERNMENTAL CAPACITY

2.1. Limited Governmental Response Capacity to Scenarios of Partial De-territorialization and De-population: From ‘Vulnerable’ to ‘Failed’ States’?

2.1.1. ‘Failing’, ‘Failed’ or ‘Collapsed’ States: Controversial Labels Challenging Formal Sovereign Equality

Just as sovereignty became the indispensable and distinctive attribute of the State since the birth of the modern European State, formal equality among States is regarded as integral to sovereignty, and the resulting principle of ‘sovereign equality’ being, in Lassa Oppenheim’s words, ‘the indispensable foundation of international society’.⁹⁸⁴ Although it constitutes, as Carlos Espósito puts it, a ‘constitutive fiction’,⁹⁸⁵ such a principle serves several important roles which help in the conduct of international relations by conveying the idea of an egalitarian international legal order in which all States are legally equal, while enabling State diversity (also referred to as pluralism in all its forms) to be tolerated.⁹⁸⁶ And yet, while the fundamental character of this principle in the construction of the modern international legal order remains uncontested, its relevance and operability in the context of contemporary international relations has been open to question. First, as a result of decolonization in the 1960s–1970s, much political input sought to focus on the need to centre on substantive and not only formal sovereignty.⁹⁸⁷ Then, since globalization spread at the end of the Cold War and

⁹⁸⁴ L. OPPENHEIM, ‘The Future of International Law’, (1921) *Carnegie Endowment for International Peace*, Pamphlet nº 39, at 20. Literature on such a grounding principle of the international legal system, such as sovereign equality, is unsurprisingly very extensive. Some examples from different schools and legal systems include, P. KOOIJMANS, *The Doctrine of Legal Equality of States: an Enquiry into the Foundations of International Law*, 1964 (Leiden: Nijhoff). Christian Tomuschat went even further, qualifying sovereign equality as a ‘Grundnorm’, in C. TOMUSCHAT, ‘International Law: Ensuring the Survival of Mankind on the Eve of the New Century’, *General Course on Public International Law*, (1999) *Recueil des Cours de l’Académie de Droit international de La Haye*, vol. 281, at 161.

⁹⁸⁵ C. ESPÓSITO, ‘Soberanía e igualdad en el Derecho internacional’, (2010) *Estudios internacionales (Universidad de Chile)*, vol. 165, at 172.

⁹⁸⁶ G. SIMPSON, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, 2004, (Cambridge, UK: Cambridge University Press), at xii.

⁹⁸⁷ A task which has led to the movement of recently de-colonized States of the New International Economic Order.

interdependence reached unprecedented peaks, legal scholars guessed that the end of the State could be closer than ever.⁹⁸⁸

However, the real challenge that the principle of sovereign equality has recently been confronted with does not simply rely on the factual inequality of a State's capacities (albeit connected to the historical phenomena of de-colonization and globalization). Such a challenge is related to the spread of new labels that seemingly sought to establish 'categories' of States, be it 'outlaw'/'rogue' States, on the one hand, or 'failed'/'failing' States, on the other. While the first category has been generally used to refer to 'criminal States' and seemingly introduces a Manichean view of international relations and has been particularly used after the 9/11 terrorist attack on New York, the second category of 'failed', 'failing' or 'collapsed' States has been particularly applied to post-colonial developing States, in view of their inherent political instability and economic underdevelopment that potentially lead to violent national and regional conflict.⁹⁸⁹ Both categories were born as highly controversial political constructs deployed after the end of the Cold War.⁹⁹⁰ They were thus made possible by the ideological homogenization that followed such a period and served to pierce the veil of formal sovereign equality and launch a move towards the grading of sovereignty, which arguably amounted to an updated re-introduction of the modernist 'standard of civilization' doctrine used before World War II to justify colonialism.⁹⁹¹ As these concepts were essentially produced

⁹⁸⁸ See for instance Jean Salmon, *supra.*, who, after deploring and detailing the weakening of State powers and dimensions, concludes that, in the absence of a credible alternative and given the resistance of the State (both as a fact and as a legal concept), the State remains an irreplaceable structure. *Contra*, wordlist approaches, such as A. KHAN, *The Extinction of Nation-States: a World without Borders*, 1996 (Michigan: Kluwer Law International). See also, C. SCHREUER, 'The Waning of the Sovereign State: Toward a New Paradigm of International Law', (1993) *European Journal of International Law*, vol. 4, issue 1, pp. 447-471.

⁹⁸⁹ For a critical explanation of how the social sciences developed representations of post-colonial States that arose as an adjunct to the hegemonic pretensions of the USA in the making of the 'Third World' during the Cold War and still ostensibly persist, see P. BILGIN and A. D. MORTON, 'Historicizing Representations of "Failed States": beyond Cold War Annexation of the Social Sciences?' (2002) *Third World Quarterly*, vol. 23, issue 1, pp. 23-50.

⁹⁹⁰ Voices opposing the concept of failed States from the policy and legal standpoints thus include, *inter alia*: R. WILDE, 'The Skewed Responsibility Narrative of the "Failed States" Concept', (2003) *ILSA Journal of International and Comparative Law*, vol. 9, issue 2, pp. 425-429; H.-J. SPANGER, 'Failed State or Failed Concept? Objections and Suggestions', *Peace Research Institute of Frankfurt*, Paper presented at the Conference on Failed States III: Globalization and Failed States, held in Florence (Italy) on 7-10 April 2000. For more recent works, see, for instance, A. AYERS, 'The Illusion of an Epoch: Critiquing the Ideology of Failed States', (2012) *International Politics*, vol.49, issue 5, pp. 568-590; N.AKPINARLI, *The Fragility of the "Failed State" Paradigm: a Different International Law Perception of the Absence of Effective Government*, 2010, (The Hague, Leiden: Martinus Nijhoff Publishers).

⁹⁹¹ Early and clear accounts in favor of the 'grading of sovereignty' by American political scientists include: Robert H. JACKSON, *Quasi-States: Sovereignty, International Relations and the Third World*, 1990, (Cambridge, UK: Cambridge University Press), based on a previous work by the same author

by policy-makers of hegemonic countries, no formal institutional definitions by the UN or regional organizations can be found; rather, a diverse range of definitions and attempts to establish formal criteria or thresholds are mainly found in national security strategies of hegemonic powers and doctrinal analyses of international relations scholars and political scientists.⁹⁹² One of the main sources of controversy arises from the fact that these newly invented categories have the potential to serve to justify – at least in political terms – foreign military intervention, in breach of the general prohibition of the use of force and of non-intervention in the internal affairs of other States laid down in Article 2(4) and 2(7) of the UN Charter, respectively.⁹⁹³

The category of ‘rogue’ or ‘outlaw’ States is left out of the present thesis, since it is not relevant to our study on the impact of climate change on the governmental capacities of Pacific Island States. The concepts of ‘failed’ or ‘failing’ States rely on the idea that, as sovereignty empowers the State, correlative responsibilities attached to such power ensue. States are, in particular, expected to perform certain functions directed at the protection and wellbeing of their respective populations, on which the State’s political legitimacy is ultimately based. Thereby, political scientists have tended to define this category loosely as those States which have been unwilling to fulfil or incapable of fulfilling the core ‘*weberian functions of the*

‘Quasi-States, Dual Regimes and Neoclassical Theory: International Jurisprudence and the Third World’ (1987) *International Organization*, vol. 41, issue 4, pp.519-549; S. KRASNER, ‘Compromising Westphalia’, (1995) *International Security*, vol. 20, issue 3, pp. 115-151; J. E. THOMSON, ‘State Sovereignty and International Relations: Bridging the Gap between Theory and Empirical Research’, (1995) *International Studies Quarterly*, vol. 39, pp. 213-233; and C. CLAPHAM, ‘Degrees of Statehood’, (1998) *Review of International Studies*, vol. 24, pp. 143-157. For a general explanation of the legal consequences of this movement, see P. MINNEROP, ‘The Classification of States and the Creation of Status within the International Community’, (2003) *Max Planck Yearbook of United Nations Law*, vol. 7, pp. 79-182. For a thorough analysis of how the civilizing mission served to justify colonial expansion and the adoption of unequal treaties, see M. KOSKENNIEMI, *The Gentle Civilizer: the Rise and Fall of International Law: 1870-1960*, 2006, (Cambridge, UK: Cambridge University Press).

⁹⁹² See, for instance, S. HOFFMAN, *Chaos and Violence: What Globalization, Failed States and Terrorism Mean for US Foreign Policy*, 2006, (Lanham, MD: Rowman and Littlefield); R. I. ROTBERG, ‘Failed States, Collapsed States, Weak States: Causes and Indicators’, in R. I. ROTBERG (ed.) *State Failure and State Weakness in a Time of Terror*, 2003, (Washington, D. C.: Brookings Institution) and by the same author ‘The New Nature of Nation-State Failure’, (2002) *The Washington Quarterly*, vol. 25, issue 3, pp. 85-96; R. H. DORFF, ‘State Failure and Responding to It’, paper presented at the 43rd *Annual Convention of the International Studies Association*, held in New Orleans (USA), on 24-27 March 2002.

⁹⁹³ For a synthetic explanation of the legal implications of the spread of the concept of failed States for international security, see, for instance, Robin GEISS, ‘Failed States: Legal Aspects and Security Implications’, (2005) *German Yearbook of International Law*, vol.47, pp. 457-501; C-D. CLASSEN, ‘“Failed States” and the Prohibition to Use Force,’ in *Les nouvelles menaces contre la paix et la sécurité internationales: Journée franco-allemande*, Société Française pour le Droit international, 2004, (Paris: Pedone), pp. 129-140.

State'.⁹⁹⁴ Some authors, such as R. Rotberg, have sought to compose a detailed list of the functions of the State the fulfilment of which should be scrutinized when considering whether a State should be labelled as 'failed' or 'failing'.⁹⁹⁵ These functions would include, first of all, the security of the population (measured by the absence of enduring political violence and by the ability to control State borders), coupled with political participation, economic development, infrastructures and social services.⁹⁹⁶ Two points are worth noting in this context. First of all, State weakness or fragility is generally differentiated from failure; while the former refers to a reduced or limited *effectiveness* of the State to fulfil one or more of the minimal functions laid down above, the latter implies that the specific function(s) at stake is(are) not fulfilled at all: it(they) is(are) *absent*. Secondly, this gradation goes on to differentiate between failed States and collapsed States, another category which tends to be even more loosely defined, but generally refers to the failure of the State to fulfil the set of specific minimal weberian functions *to the extent that* the conditions necessary for the State to 'sustain itself as a member of the international community' are no longer met.⁹⁹⁷ W. Zartman, for instance, defined State collapse as occurring when a State 'can no longer reproduce the conditions for its own existence'.⁹⁹⁸

2.1.2. From 'Failed States' to Extinction of Statehood: The Big Gap

Considering that the definition of failing, failed and collapsed States is not only controversial, but also variable, unsettled and multiform, one is faced with the question of how should concrete cases, such as those of certain Pacific Island States, be approached and, more importantly, how can it be possible to disentangle the concrete legal elements so that we can consider whether Pacific Island States will eventually become 'failed' or even 'collapsed' States as a result of the adverse impacts of climate change. As slippery and as difficult such task may be, one thing can still be made clear: approaching the case of Pacific Island States from the angle of failed or collapsed States would require answering three consecutive questions.

⁹⁹⁴ J. DI JOHN, 'Conceptualizing the Causes and Consequences of Failed States: a Critical Review of the Literature', January 2008, *School of Oriental and African Studies, Crisis States Working Paper Series*, vol. 2, paper n° 25, at 4.

⁹⁹⁵ R. ROTBERG, 'The New Nature of Nation-State Failure', (2002) *Washington Quarterly*, vol. XXV, issue 3, pp. 85-96, who considered that the severity of State failure could be ranked according to the specific function that the State was not fulfilling.

⁹⁹⁶ *Ibid.*

⁹⁹⁷ G. HELMAN and R. RATNER, 'Saving Failed States', (1993) *Foreign Policy*, vol. 89, pp. 3-20.

⁹⁹⁸ See, W. ZARTMAN, *Collapsed States*, 1995, (Boulder, Colo.: Lynne Rienner).

Given that State capacities are not uniform across functions and that, as J. Di John explained, '*it is imperative for any definition of "failure" to be explicit in which dimension a State fails*',⁹⁹⁹ the first question that arises is whether, when and how may the '*precise tipping points*', where State weakness transforms into failure or collapse, be identified.¹⁰⁰⁰ To be sure, one may make a projection and estimate that the effects of climate change on the Pacific island's territories and populations will gradually exert an increased pressure on the already limited capacities of Pacific islands' governments. As already seen in Chapters 4 and 5, while sea-level rise and coastal erosion are already forcing these States to take active measures to stabilize and fix their maritime territorial entitlements and enhance regional co-operation to develop infrastructures that may increase their climate change resilience, population relocations have forced some Pacific Island States to produce relocation plans, negotiate with the relevant stakeholders and even seek international financing.¹⁰⁰¹ Yet, setting the criteria for establishing when the limited effectiveness of Pacific island governments to fulfil the 'weberian functions' of the State in the context of acute climate change impacts may so deteriorate as to amount to 'failure' [of the State] is unsettled and highly contested.

Nonetheless, if State failure of Pacific Island States were to be acknowledged internationally – for instance, as a result of a resolution of a relevant United Nations body, or of self-acknowledgement by the States concerned – the second question that arises is whether State failure or collapse necessarily implies loss of statehood. Most literature on State failure or collapse generally uses such a term to refer to what in practice corresponds to government failure or collapse. This terminological equation is nevertheless understandable for, as already pointed out above, States are juridical persons which necessarily act through one organ, namely, the government. The fundamental importance of an effective government at the time when a political entity seeks to acquire statehood is indubitable; its existence is also generally considered and balanced along with other related considerations, such as the political legitimacy of such a government and its connection with the people's right to self-determination. And certainly, the subsequent loss of an effective government, as Tomas Baty's words opening this chapter illustrate, is no little matter. However, irrespective of the legal consequences that the lack of an effective government may be, State practice indicates that the failure of the State to fulfil its functions does not imply that its statehood is challenged. As Rosalyn Higgins emphatically and clearly stated, '*what is absolutely clear is that a loss of*

⁹⁹⁹ DI JOHN, *supra*, at 4.

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ See Chapters 4 and 5.

*“stable and effective government” does not remove the attribute of statehood, once acknowledged’.*¹⁰⁰²

Yet one point deserves attention in this context, which relates to the specificity of Pacific Island States. Although government failure as such is not, according to consistent State practice recently exemplified with the cases of Somalia or Afghanistan, a circumstance that may challenge the continuation of the affected State,¹⁰⁰³ one may wonder whether such continuation could be at risk when the failure of the government is coupled with the partial loss of territory and the partial but significant de-population of the State itself. This question is challenging in so far as it directly touches on the already mentioned inherent bias of the international legal order to maintain the status quo for the sake of the stability of international relations, irrespective of whether such stability requires the maintenance of legal fictions. Therefore, when and why the extinction of statehood takes place is ultimately a matter that will probably be resolved by the weight of the facts; it will invite scrutiny of the future adaptation of State practice in this matter, while from a theoretical viewpoint it will also require returning to general theory of the State.

Finally, the third question that arises when considering whether Pacific Island States may become ‘failed’ or ‘collapsed’ States regards the obligations and responsibilities of other States in such a situation. Literature on State failure and collapse has sometimes developed the idea that the observed existence of failed States engages the responsibility of the Great Powers to act in the country and participate in the prevention of failure or in the reconstruction of the State at stake.¹⁰⁰⁴ These accounts may be dangerous from a policy

¹⁰⁰² R. HIGGINS, *supra*, at 40.

¹⁰⁰³ In fact, as Paul Williams notes, the failure of the governance structures of a State are not even generally homogeneous in all the territory. Rather, different *‘degrees of success and failure can exist within a single State’*, for the failed zones usually being made up of *‘numerous (often interconnected zones) where different sources of authority may dominate the local governance structures’*. Focusing on the example of Somalia, the author for instance notes that the collapse of the Somali central government *‘did not automatically exclude the possibility that zones of alternative forms of governance and authority existed within Somalia’s officially recognized international borders’*. As Kenneth Menkhaus has observed, since 1991 *‘Somalia has repeatedly shown that in some places and at some times communities, towns, and regions can enjoy relatively high levels of peace, reconciliation, security and lawfulness despite the absence of central authority’*, in P. WILLIAMS, ‘State Failure in Africa: Causes, Consequences and Responses’, in *Africa South of the Sahara*, 2010, (39th ed.), Europa World Yearbook, pp.21-28.

¹⁰⁰⁴ See for instance, Robert Jackson, who equates today’s Great Power responsibility in the face of State failure to the earlier trusteeship function performed by the ‘benevolent international society’ during the decolonization process. R. H. JACKSON, ‘Surrogate Sovereignty? Great Power’s Responsibility and “Failed States”’, (1998) *Institute of International Relations of the University of British Colombia*, Working Paper n° 25, 17 pp; see also D. CHANDLER, ‘Great Power Responsibility and Failed States: Strengthening Sovereignty?’, in J. RAUE and P. SUTTER, (eds.), *Facets and Practices of State-Building*, 2009, (Leiden: Martinus Nijhoff).

perspective in so far as they potentially incentivize unilateral or multilateral, but potentially illegal, intervention in the domestic affairs of the State, in breach of Article 2(7) of the UN Charter. While foreign intervention may be necessary and even justified on the basis of the recently developed concept of responsibility to protect,¹⁰⁰⁵ the use of the channels of the collective security system laid down in the UN Charter is fundamental to prevent power-based abuses. Henceforth, focus may be turned onto the actions by the international community as a whole (acting through UN bodies and institutions or by delegation or authorization). First, to assist the State in preventing collapse from crystallizing, and then, if failure or collapse ensues, to revive the affected capacities of the State or to assist in the re-building process in cases of conflict or natural disaster.

2.2. Scenarios of Total De-territorialization and De-population: Pacific Island Governments in Exile?

2.2.1. Governments in Exile: An Uncontroverted Concept in International Law

Contrary to the controversy that the approach to Pacific islands' challenged indoors governmental capacity from the perspective of 'failing', 'failed' or eventually even 'collapsed' States arguably generates, addressing the consequences of the evacuation of Pacific island governments – particularly those of the most threatened low-lying island States of Tuvalu and Kiribati – beyond their respective national borders is a matter of interpreting how longstanding rules and State practice regarding governments-in-exile may be adapted to these situations. So far, this scenario is only a projection in time of what the acute consequences of climate change impacts may lead to and stems from the assumption that, if Pacific island de-population reaches a high threshold – close to the realization of a 'total' de-population scenario – the respective governmental authorities of the island States concerned will correlatively be forced to leave. Both situations will then presumably be followed by the severe and eventually total de-territorialization of such States. At first glance, dealing with governments in exile may seem to raise issues related to the 'outdoors' governmental capacity of Pacific Island States to engage in international relations with other States and with international organizations, rather than a matter of challenging internal governance. In fact,

¹⁰⁰⁵ See the Report of the International Commission on Intervention and State Sovereignty, Responsibility to Protect, 2001, (Ottawa: International Development Research Center), which stipulates in Principle 1(B) that: 'Where a population is suffering serious harm, as a result of internal war, insurgency, repression **or state failure**, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect', at XI. [Emphasis added].

the evacuation of governments beyond national borders affects both dimensions. To be sure, on the face of it, this situation leads to the issues pertaining to the recognition by other States of the authorities in exile as the government of the State concerned. Yet, as laid out in more detail below, this issue risks being much less of a concern in the case of eventual evacuations of Pacific islands' governments, for no competing *de facto* or *in situ* authorities are likely to be present in these cases. In contrast, most of the difficulties traditionally encountered by governments in exile with regard to the internal affairs of the country are likely to be shared by all evacuated Pacific islands' governments, while these will also present new additional challenges pertaining to the specific climate-related context in which the need to evacuate the country is generated. Ultimately, the possibility that the evacuation of Pacific islands' governments may mark the moment at which Pacific Island States' weakness and fragility bring failure or even collapse deserves consideration.

Governments in exile are not, *per se*, a new concept in international law, nor a controversial one. In fact, as Stefan Talmon explains, the term 'governments in exile', as such, does not correspond to a specific legal status but simply indicates that the domicile of a government – that is, the authority through which the State displays and exercises its sovereign competences – is located outside the national territorial borders.¹⁰⁰⁶ Talmon also criticizes how the hyphenated expression 'governments-in-exile' is misleading in this sense, for it gives the impression that they constitute an independent subject of international law with a legal status distinct from that of governments, a consideration which is inconsistent with State practice. S. Talmon's criticism is based on consistent State practice, which, according him, shows that, in these situations, States have chosen either to recognize authorities abroad as the government of a State, or not to recognize them as such; what States have never done is to recognize an authority as a 'government in exile'. The fact that the government is outside the national territorial borders is thus a matter of fact which, albeit carrying a set of legal consequences pertaining to the exercise of sovereign State competences, does not transform the legal nature of the government nor its legal status in international law.¹⁰⁰⁷ Hence, Stefan Talmon recalls, there is no precedent of a State having denied a certain governmental competence to a government on the ground that its domicile was outside the national territorial borders of the State it represented.¹⁰⁰⁸

¹⁰⁰⁶ S. TALMON, *supra*, at 16.

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ *Ibid.*

Traditional circumstances in which governments have been led to evacuate themselves from the country are related to the outbreak of violent conflict, leading to belligerent occupation or civil war and/or stemming from either decolonization or even the defence of democratization.¹⁰⁰⁹ These circumstances imply that, when authorities of a State are forced to leave, they raise one main political and legal issue, namely, the competition between two co-existing authorities claiming governmental status in respect of the State in question. This is particularly clear when it comes to situations of belligerent occupation, in which a *de facto* authority controlling the territory and population competes with the *de iure* government forced into exile and seeks to obtain recognition from other States as the 'new' government of the occupied State. These cases imply that the *de facto* authority seeks to *shift* the recognition of other States from one authority to another, for only one government at a time can have the competence to bind its State.¹⁰¹⁰ This situation of double authorities claiming international recognition is, however, not likely to occur in the case of Pacific Island States. Rather, the situation they are most likely to find themselves in is one in which the same authorities that constituted the legitimate government, recognized as such by the international community, are forced to continue exercising their functions outside their national borders as a result of severe impacts of climate change on the habitability conditions of their territory and presumably to do so with most of its population (equally forced to leave the country). Therefore, as presumably no competition of authority will take place, it seems more appropriate to refer to Pacific islands' governments abroad as '*ex situ* governments', rather than as 'governments in exile'.¹⁰¹¹

¹⁰⁰⁹ Many prominent cases of governments in exile occurred during the World War II, as the German invasion gradually spread over Europe. For instance, in 1939, the Polish Government escaped under the orders of General Sikorski from Paris to London; the same year the Czech president Eduard Benes settled in London and was recognized as the head of the Czech government in exile for two years. This also applied to many European royal families. Queen Wilhelmina of The Netherlands, the Grand Duchess of Luxemburg, King Peter II of Yugoslavia, King Haakon VII of Norway and King George II of Greece all moved to London with their cabinets between 1939 and 1941. See H. L. SCANLON, *European Governments in Exile*, 1943, (Washington, DC: Carnegie Endowment for International Peace). More recent post-World War II examples of governments in exile can be found in Y. SHAIN, *Governments-in-Exile in Contemporary World Politics*, 1991 (London: Routledge). These include the aspirations of an exiled group known as the National Coalition Government of the Union of Burma to overthrow its home country's government; the case of the 'Gouvernement Provisoire de la République Algérienne', which resulted from the post-colonial political instability; and even the claims of the Tibetan Government in Exile for a political status independent from China.

¹⁰¹⁰ G. SCELLE, *Manuel de Droit international public*, 1948, (Paris: Domat Montchrestien), at 174-5.

¹⁰¹¹ Indeed, according to the Oxford Dictionary, the term 'exile' is defined as: '*the state of being barred from one's native country, typically for political or punitive reasons*'. The use of the term '*ex situ* government instead of the word 'exile' thus seeks to highlight the fact that the cause of the evacuation is not political.

Just as governments in exile do not constitute a category with a distinct legal status under international law, Pacific islands' ex situ governments should not be different either. Issues pertaining to the recognition, by other States, of authorities abroad as the government of the Pacific island State concerned are presumably simplified by the absence of such competing claims. Nonetheless, international recognition of the fact that the government of a Pacific island State has become domiciled outside its national borders will arguably remain necessary, for a set of legal consequences stemming from such a situation will still be unavoidably present. The next section of the present chapter therefore scrutinizes the main legal consequences arising from prospective Pacific islands' ex situ governments, applying them to the specific circumstances and challenges that they may encounter and ultimately locating the projected situation of Pacific islands' ex situ governments in the overall context of the impacts of climate change on the continuation of Pacific islands' statehood.

2.2.2. The Real Threat to the Continuation of Pacific Island States: Conjunction of the Challenges to the Three Dimensions of Statehood

One of the fundamental characteristics of recognition of governments in exile is that it does not depend on the exercise of effective control of the territory by the authority claiming governmental status. Such a characteristic is likely to be highly important and useful for Pacific islands ex situ governments which, in spite of facing a situation in which their outer maritime borders may be under stress due to sea-level rise and to severe coastal erosion, may still take actions in the international arena seeking to protect such borders from becoming part of the high seas. However, if recognition of Pacific islands' ex situ authorities as governments is important to ensure some level of protection of Pacific islanders and their interests abroad, described by S. Talmon as '*one of the most noble tasks of States*', and is a corollary of the State's personal sovereignty over its citizens.¹⁰¹² The possibility to fulfil such a task is not affected by the government's limited capacity or even complete incapacity to control its territory effectively. Also, such protection may be ensured by other States' commitment – by means of an inter-State international agreement – to protect the nationals of the affected State. Such protection may take the form of consular representation, the furnishing of passports and identity cards to protect them from being considered abroad as stateless and,

¹⁰¹² S. TALMON, *supra*, at 202. '*A precondition however is that they are recognized as the governments of the States whose nationals require protection*'. Therefore, nationality holds as the only prerequisite for the right to diplomatic protection (the effectiveness of the protection in any particular case being irrelevant).

most importantly, through the conclusion of migration arrangements with other States in which Pacific island populations may be relocated.

The need to conclude international arrangements, either with other States or with international organizations willing to help their population, leads to the question of the legal effects of the *ex situ* status of Pacific islands' governments on the representation of their State before the international community. As only one government at a time is legally competent to bind the State, it follows that only if the *ex situ* authorities have been recognized as governments may they validly sign, ratify, or accede to international (bilateral or multilateral) agreements. Again, as no competition between *de facto* occupant authorities and *de iure* authorities in exile for recognition of governmental status is likely to take place in the case of Pacific Island States, the recurrent *formal* issues stemming from the uneven recognition by only some States parties to a multilateral agreement which the State concerned wishes to accede to is not an issue. The same may apply to the issue of whether *ex situ* authorities not recognized as governments may only enter into agreements in their own name or on behalf of the political movement they constitute, but not on behalf of the State they purport to represent.¹⁰¹³ In contrast, effects of recognition of *ex situ* authorities as governments on the *substance* of the treaties that such authorities are competent to conclude will be applicable in the case of Pacific Island States. To begin with, as the government of a State holds the exclusive and plenary capacity to bind the State it represents, only the *ex situ* authorities recognized as governments will be able to conclude treaties that involve the exercise of State sovereignty, such as treaties which dispose of the State's territory.¹⁰¹⁴ Some scholars, such as Krystyna Marek, have nonetheless taken the view that the inherent limitations of an *ex situ* government make it incompetent to conclude treaties affecting the cession of a part of the State's territory. S. Talmon, in contrast, holds that there is 'no halfway' situation; either an authority is recognized as a government, becoming entitled to conclude all kinds of treaties, or it is not recognized as a government and cannot therefore bind the State it purports to represent through any treaty. What the absence of the government from the State territory may imply, S. Talmon specifies, is that the capacity of the State to *perform or comply with* the obligations of a treaty may be limited.

¹⁰¹³ S. TALMON, *supra*, at 203.

¹⁰¹⁴ *Ibid.* 'Treaties which dispose of State territory have also been concluded only with authorities in exile recognized as governments, as only a government may exercise the State's territorial sovereignty. Treaties under which the State's rights are relinquished have also been concluded only by and with authorities in exile recognized as a government.'

Therefore, being *ex situ* alone is not an impediment for Pacific islands' governments evacuated abroad to continue concluding international agreements validly on behalf of their respective States. Rather, the main issue arising out of the specific circumstances of Pacific islands' *ex situ* governments pertains to the fact that there will presumably be no temporal limitation on such exceptional situations. As the general assumption that the absence of *ex situ* governments from the State territory is only temporary cannot be applied to Pacific islands' *ex situ* governments, the limitation of the States' capacity to perform certain treaty obligations will presumably turn into a settled incapacity to implement treaties. Although this incapacity does not affect their competence to conclude them, it does limit the range of treaties that Pacific islands' governments will be allowed to conclude, for they will not be able to conclude treaties they will only implement on their return to the national territory. Alternatively, they may choose to conclude treaties binding them only up to a certain number of years, while their transition to 'partial' de-territorialization and de-population takes place. This is actually common practice for traditional governments in exile, which have concluded treaties governing military, defence, economic, trade, loan, aid, extradition, administration, and even political agreements that are enforceable for only twenty years.

Furthermore, what is being highlighted for future treaties is seemingly applicable to treaties that had been concluded before the evacuation of the government. Existing treaties benefit from the general presumption of continuance, and thus absence from the State territory does not automatically suspend or terminate them. However, pursuant to Articles 61(1) and 62 of the Vienna Convention on the Law of Treaties, the conditions that cause a government to establish itself abroad may lead to the termination or suspension of treaties because of the impossibility of performance or of a fundamental change of circumstances. Hence, while *ex situ* governments alone do not constitute an overriding impossibility or a fundamental change of circumstances sufficient to justify the termination or suspension of a treaty, they may be an *exonerating cause* of State liability for non-performance or non-compliance with treaty obligations in the context of State responsibility.¹⁰¹⁵

Closely connected to the importance of recognition of Pacific islands' *ex situ* authorities as governments in the realm of treaty law – determinant in establishing whether such governments can exercise the rights of the State or perform State obligations and conclude new treaties, but also to suspend, terminate or denounce existing treaties they may not be able to perform anymore – is the issue of privileges and immunities of such *ex situ*

¹⁰¹⁵ S. TALMON, at 115.

governments. Just as with existing treaties, the ex situ authorities recognized as governments benefit from the presumption that they possess certain competences, privileges and immunities, unless otherwise provided by the recognizing State.¹⁰¹⁶ Government recognition is fundamental only for authorities recognized as *de iure* governments to enjoy privileges and immunities. This element of legal protection has been very important in various traditional historical precedents, given that most traditional situations of governments in exile have been produced in contexts of internal or international conflict. Traditional types of aid that ex situ governments have requested from regional and international organizations have thus included the creation of new police forces or modernization of their existing armed forces, the freezing of the State foreign financial assets, the imposition, through the operation of the collective system of international peace and security, of economic sanctions and an arms embargo on the de facto, in situ authority or the sending of civilian or diplomatic missions to their States. Yet, in the case of Pacific Island States, the importance of getting international recognition of their evacuated authorities as governments stems from the fact that recognized ex situ governments may validly authorize other States to intervene within the territorial boundaries of the State and provide it with the necessary humanitarian assistance.¹⁰¹⁷

Apart from authorization to receive humanitarian or other sorts of assistance from the international community, Pacific islands' ex situ governments will probably be called upon to take interim measures that will require, inter alia, the development of national legislation. Therefore, the question of how the ex situ condition of a government may affect the State's jurisdiction requires consideration. A State's jurisdiction to prescribe exists by virtue of a governmental status in international law, irrespective of whether or not its government is absent from State territory. This has two main consequences. First, governments in exile, S. Talmon writes, '*do not exercise jurisdiction derived from the host State, but exercise their own jurisdiction in the host State*' and therefore, secondly, '*government recognition does not establish jurisdiction*'.¹⁰¹⁸ Therefore, the State's jurisdiction to prescribe is not limited by the location of its government abroad. In contrast, pursuant to the principle of territorial sovereignty, the State's jurisdiction to enforce the laws it prescribes (whether new laws enacted ex situ or former laws still in force) is limited, and requires in any case the consent of the host State. Such consent may be given expressly or implicitly (for instance through the invitation of a group of exiles). Moreover, as S. Talmon reminds us, an ex situ government does

¹⁰¹⁶ *Ibid.*, at 116.

¹⁰¹⁷ *Ibid.*, at 126: '*no State may exercise the supreme authority within the territory of another State without the latter's consent except as a result of belligerent occupation*'.

¹⁰¹⁸ *Ibid.*, at 244.

not possess more powers than it does at home, but may nonetheless be allowed by the host State to exercise more of the existing powers than usual, in the light of special circumstances and by way of comity. Finally, closely related to the limited jurisdiction of States with governments abroad to enforce is the jurisdiction to adjudicate. Traditional situations of governments in exile would not see their jurisdiction to adjudicate, as such, affected, since the judiciary may not have been evacuated with their governments all together. Therefore, the principle that applies in normal situations of governments in exile simply holds that host States may determine *to what extent* may the courts of the State exercise their jurisdiction – although they may not prescribe how such jurisdiction should be exercised. Moreover, the courts of the host State are under no obligation to recognize and enforce the laws of another State within its territory. These courts will simply do so when the conflict of law rules of the host State so prescribe, which will generally depend on two factors: whether the law is valid in its State of origin (and according the rules of such State); and whether they are contrary to the public order of the host State.¹⁰¹⁹

Last but not least, the evacuation of Pacific islands' governments may have consequences bearing on their access to State property, whether abroad or still in the State territory. As a corollary of a government's exclusive and plenary right of representation of its own State in international relations, only authorities recognized as governments can validly make arrangements affecting the legal status of the property of their nationals abroad as well as of the State's public assets (in the former case, this competence corresponds to the exercise by the State of personal sovereignty over its nationals, be it in State territory or abroad). As most governments abroad have been at least partly financed by their respective host States and/or other States, they seek to secure access to ownership of property abroad as quickly as possible, so as to organize an effective administration in exile, send diplomatic missions to other States or multilateral fora to plead their cause and gain allies, and maintain a certain independence from their host State – all measures directed at regaining control over their national territory. One of the first actions is usually to secure control of their State's assets and sources of revenue abroad. As a matter of principle, a recognized government in exile is entitled to dispose of its State's property abroad, allowing the sale of national property, drawing upon credits granted to their States, manage state-owned companies, occupy State property, like diplomatic and consular premises, and receive sums due to its respective

¹⁰¹⁹ *Ibid.*

State.¹⁰²⁰ Governments themselves are not the owners of their respective State's property, but only hold it in trust and administer it. Recognition of an authority in exile as a government implies that the right to administer property automatically passes to the newly recognized government. In the case of Pacific island ex situ governments, this right and capacity will presumably be capital for them to effectively organize the necessary measures to ensure the safety of evacuation or transfer of the population, the negotiation of agreements with other States concerning the right of entry of their nationals into the territory of another State, the eventual purchase of land abroad to relocate their people, the payment of costs associated with the diplomatic missions to the regional and global international organizations (e.g. developing further the Climate Change and International Security Discourse) seeking to gain support for their cause and international humanitarian assistance, etc.

All in all, what can be extracted from the study exposed in this thesis is that ex situ governments alone do not, in traditional cases, constitute a real challenge to the States concerned. While the exercise of some of the State's powers – such as jurisdiction to enforce or the capacity to perform certain treaty obligations – is limited by the circumstances leading to the evacuation of State territory, a national authority abroad, as long as it is recognized as the government in exile, maintains the full and exclusive capacity to represent the State abroad, to exercise legislative jurisdiction over its national assets, and be endowed with all necessary privileges and immunities. It is thus still possible for the State to exercise its weberian functions in favour of its population, in spite of having its representative organ located outside its national territory. However, the prospective situation of Pacific Island States offers a slightly different picture, for they do not comply with the general assumption that the ex situ status is only temporary, nor does their situation stem from a competition between a *de iure* and a *de facto* authority from another occupying State. These distinctive characteristics stem from the fact that the evacuation of Pacific island governments will presumably take place at a time when the two other dimensions of the State will be severely affected by a double-sided de-territorialization and de-population scenario. The main characteristic of ex situ governments, namely their presumed temporality, would thus disappear. In fact, even if the lands lost to sea-level rise, coastal erosion or other natural causes were to re-emerge in the long term, as Esteban and Yamamoto mention,¹⁰²¹ the whole

¹⁰²⁰ *Ibid.*, at 192.

¹⁰²¹ L. YAMAMOTO and M. ESTEBAN, 'Vanishing Island States and Sovereignty', (2010) *Ocean and Coastal Management*, vol. 53, pp. 1-9. Extending the lines of this article, L. YAMAMOTO and M. ESTEBAN recently published *Atoll Island States and International Law: Climate Displacement and*
380

population would have left anyway. And, therefore, the problem of Pacific islands' ex situ governments, when put in the context of the general deterioration of the other two dimensions of the State due to climate change impacts, devolves into a problem of the continuation of Pacific Island States altogether (the two being at a time mutually exclusive).

As J. Crawford points out, international lawyers have generally paid little more attention to problems of State continuation or extinction than to those of the definition and operation of the concept of statehood itself.¹⁰²² The question of State continuation or extinction is rather underdeveloped theoretically and has been traditionally approached as an issue to be necessarily resolved, for the law of State succession to come into operation. State continuation is, therefore, as defined by J. Crawford, assured when the same State can be said to continue to exist, despite changes of government, territory or population; whereas State succession implies that one State can be said to have replaced another – previously extinguished – State in the same territory.¹⁰²³ The concept of continuation therefore implies that legal relations are preserved despite changes in the subject of the relations. Territorial changes – and the concomitant changes in population – such as loss of or acquisition of territory, do not per se affect the continuation of the State; the presumption of continuation being particularly strong when the constitutional system of the State existing prior to the territorial change remains in force. The same can be applied to changes in the municipal constitution of the State, which per se do not affect State continuation. Yet, problems arise where the constitutive elements or criteria of statehood undergo *multiple* and *substantial* changes. It is precisely in these marginal cases that what J. Crawford names the '*distinct element of legal fiction*', inherently present in the concept of continuation, is unveiled. In such instances, the role of recognition and the claims to continuation made by the concerned States become determinant. And thus, given that Pacific islands' governments will be called upon to evacuate in contexts of acute de-territorialization and de-population, recognition of Pacific islands' ex situ governments in such instances could arguably amount to recognition of the continuation of Pacific islands' statehood, or at least could have the potential to become recognition. Simply put, recognition of a government would thus potentially shift into recognition of State continuation. Although this certainly does not mean that problems of

Sovereignty, 2013 (Berlin and Heidelberg: Springer). See also Krystyna Marek, who rejects the possibility that extinguished States may 'miraculously' re-emerge afterwards, cited in J. CRAWFORD, *supra*, at 401 (Chapter 16, note n° 7).

¹⁰²² J. CRAWFORD, *supra*, at 401.

¹⁰²³ *Ibid.*, at 400. As Crawford recalls, the notion of continuation has been criticized by some international legal scholars such as Ian Brownlie, for being misleading and over-general.

continuation and statehood are resolved by application of a constitutive theory of recognition for, as Crawford puts it, *'it can hardly be denied that it will constitute important evidence of that status, particularly in doubtful or marginal cases'*.¹⁰²⁴ Taking J. Crawford's view that *'the rules for determining identity and continuation are variants upon the basic criteria of statehood, with the addition of certain specific qualifying or particularizing rules'* that attribute to the recognition and the claims of the States concerned a decisive power, an incursion into the effects that climate change may exert on the Pacific island State's capacity to maintain or engage in international relations becomes necessary.

3. THE 'OUTDOORS CHALLENGE': IMPACT OF CLIMATE CHANGE ON PACIFIC ISLANDS' CAPACITY TO MAINTAIN INTERNATIONAL RELATIONS

3.1. Pacific Island States in the International Community

3.1.1. Contrasting Faces: Limited National Governmental Capacity vs. Active Participation in International Life

In contrast to the limited governmental capacity of Pacific island States and their potentially increased struggle to fulfil the weberian 'minimal functions of the States' as climate change impacts become more severe, their participation in international life has proven to be steadily active, particularly for the last fifteen years. This may be surprising given that the governmental authorities that exercise the State's sovereign power over its population and territory are also tasked with establishing and maintaining international relations with other States and international organizations. Hence, it could arguably be assumed that the weakness or fragility of the government in the execution of its internal duties could be transferred to the exercise of its external rights and duties. Nonetheless, the history of Pacific Island States' conduct in the international arena is far from matching this picture. Indeed, ever since they came into being as autonomous and sovereign political entities, Pacific Island States have made a big effort to maintain international relations. In fact, it may be precisely because of their inherent physical, political and economic fragility, as well as their geographical isolation, that they have constantly sought the support of the international community. The first and most visible example of the high level of dependence of Pacific Island States on the good state of their international relations can be found, as already analysed in Chapter 4 above, in their

¹⁰²⁴ J. CRAWFORD, *supra*, at 411.

request for full membership as States in the UN.¹⁰²⁵ This stage was all the more important at the time of their independence that, as William Harris explained, for most of them, acceptance of their request for UN membership was tantamount to international recognition of their acquisition of statehood.¹⁰²⁶ Besides, other than maintaining constant international relations with other States through multilateral diplomatic fora in relevant UN bodies and agencies, Pacific Island States have nurtured bilateral relations with individual States with which they have concluded international trade, commercial and investment agreements that are capital for their respective economies. Sometimes, this dependency on foreign investments has been at the cost of controversial political decisions going against the general flow, such as the attempts by some Pacific Island States – Vanuatu, Kiribati, Nauru, the Solomon Islands and Tonga – to switch their allegiances between China and the recognition of Taiwan as a State depending on the course of the ‘dollar diplomacy’.¹⁰²⁷ As Yongjin Zhang remarks, *‘the Pacific has been one of the most fiercely fought battle-grounds in the struggle between China and Taiwan for international recognition since the 1970s’*.¹⁰²⁸ This example in turn raises the question of the role actually played by Pacific Island States in the international community.

While the fact that access to statehood was opened to them as a result of the contextual framework of the time – and thus reflected the structural changes that the international community had undergone since the beginning of de-colonization – the role they played afterwards was still limited by their small leverage and high degree of dependence on external assistance to ensure their sustainability and development. While the acceptance of full UN membership did not provoke fundamental imbalances in the international order of the Cold War period, as some political leaders of the time had feared, it cannot be denied that Pacific Island States have been and still are being used by other States (mostly the Great Powers) as a useful source of votes necessary to ensure the success of an important voting procedure in the UN General Assembly. The statement of the Australian delegate to the 2006 UN General Assembly session, when the resolution on ‘Climate Change and its Possible Security Implications’ was discussed, is a straightforward acknowledgment of this ‘manipulation’.¹⁰²⁹ One of the latest examples and most paradigmatic of this political manipulation can be found in the General Assembly session at which the question of whether

¹⁰²⁵ See Chapter 4, Section 2.2.2.

¹⁰²⁶ See W. HARRIS, ‘Microstates in the United Nations: a Broader Purpose’, *supra*, at 33-39.

¹⁰²⁷ See Y. ZHANG, ‘A Regional Power by Default’, in Terence WESLEY-SMITH and E. A. PORTER, *China in Oceania: Reshaping the Pacific?*, *supra*, pp. 49-66, at 51.

¹⁰²⁸ *Ibid.*

¹⁰²⁹ See Chapter 3.

Palestine could be accepted as a UN Observer *State* was voted. Of the nine votes against the motion, other than those of Israel and the USA, four were of Pacific Island States: Nauru, along with the Marshall Islands, Federated States of Micronesia and Palau, three island States formerly administered by the United States under the Pacific Access Category and which now have a compact of free association with the USA. Interestingly enough, when Emanuel Mori, President of the Federated States of Micronesia, was interviewed on the reason for his country's vote, he replied, in a rather compassionate tone, that *'Israel is a minority in the Middle East and struggling to survive. [W]e are also out there. We have no enemies, only natural ones. Typhoons come, and we survive. Being surrounded by not-friendly neighbours, we kind of pity them.'*¹⁰³⁰

Other than bending themselves to the interests of other States, Pacific Island States have a tendency not to be part of international agreements they feel they cannot comply with. Their practice seems to indicate that they are highly self-conscious about the international obligations that statehood implies, and are therefore highly reluctant to enter into agreements they do not have the capacity to comply with. As already pointed out in Chapter 5 above, this is one of the reasons why the Pacific has been defined by the Office of the High Commissioner on Human Rights as the region with the lowest ratification of human rights instruments in the world.¹⁰³¹ However, this approach to international agreements had not precluded them from developing regional international co-operation nor from constructing, through their Pacific Islands Forum, an alternative and self-led platform on which, in spite of the numerous differences and cultural disparities among Pacific Island States, a common ground for their 'regional identity' can be solidly built. Henceforth, the last fifteen years, in particular, have seen an exponential growth of the subject matter of successful regional co-operation, in such areas as security, exploitation of common marine resources, sustainable development, etc. It has also helped in building up a common voice for all, or at least most, Pacific Island States in international fora, for their common position is now increasingly being presented by the Secretary of the Pacific Islands Forum, instead of by each State individually, as their action in the integration of the Climate Change and International Security Discourse before universal international organizations shows.¹⁰³²

¹⁰³⁰ The interview where the statement of Emanuel Mori is reproduced can be found at: <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/30/coalition-of-the-opposing-why-these-9-countries-voted-against-palestine-at-the-u-n/>

¹⁰³¹ See Chapter 5, Section 4.2.

¹⁰³² See Chapter 3.

Furthermore, the reluctance of Pacific Island States to become part of international agreements they may not be able to comply with has not affected international environmental law. Indeed, all Pacific Island States are parties to the UNFCCC and some of them have also ratified other multilateral environmental agreements. For many, the UNFCCC is almost the only treaty they have ratified. Their participation as States parties to the international regime on climate change is, first of all, undoubtedly facilitated by the fact that the regime's structure is based on the principle of common but differentiated responsibilities. As all Pacific Island States are non-Annex-I countries, they have no obligation to reduce their share of greenhouse gas emissions, but remain among the beneficiaries of climate change adaptation funds and transfer of relevant technology – both serving as complementary and indirect means of obtaining international investments necessary to cope with their high level of vulnerability to climate change impacts.

Yet, the role played by Pacific Island States should not be reduced to a double-edged dimension consisting of either being toys in the hands of the Great Powers or highly dependent passive players seeking means to obtain funding in every corner of the world. In fact, Pacific Island States – along with other highly active small island States, like the Maldives – can be said to be not only active 'players', but even 'powers' in the context of the climate change negotiations, to the extent that they embody the conscience and underlying normative grounds and principles on which the international regime on climate change was built, and thus recall the ultimate purpose of all the effort deployed to make international co-operation on climate change successful. Although this 'power' of leverage cannot, of course, be equated to the economic and political strength of the Great Powers – USA, the EU and the five big emerging countries – which hold the future of the regime, it is nonetheless significant. This power is all the more remarkable in that it is accompanied by a highly efficient institutional structure through which it can be displayed, namely the Alliance of Small Island States. Through this political coalition, Pacific Island States and other small island States from different oceans have demonstrated that they are not always simple instrumental votes in the hands of the Great Powers, nor even of their closest and most important regional partners, like Australia and New Zealand, which are both part of the same climate change political coalition as the USA, known as the UMBRELLA group. Ultimately, their voice contributes nowadays – particularly during controversial political moments – to establish whether the course of the climate change negotiations is succeeding or flawed, and they will certainly continue to do so.

3.1.2. Back to the Climate Change and International Security Discourse: A Prelude to Pacific Island States' Claim to Their Own Continuation?

The generally active participation in international life that Pacific Island States have consistently demonstrated over the years since acquiring statehood is extendable to the challenge constituted by climate change impacts, for, as already seen in Part I of this thesis, they were the active promoters – along with the EU – of the introduction and further evolution of the Climate Change and International Security Discourse from 2007 onwards. As Part I of this thesis indicated, the development of the Discourse through three main successive phases, in 2007, 2009 and 2011, in which the Discourse was disseminated from the Security Council to the General Assembly and then back to the Security Council, eventually permitted understanding it as the source legitimizing consideration of the question of whether and how the continuation of Pacific islands' statehood might be jeopardized by climate change impacts. Yet, in the end, following scrutiny of how the adverse impacts of climate change challenge the geographical, human and internal governance dimensions of the State, the relevance of the Climate Change and International Security Discourse acquired a new breadth. Indeed, the Discourse comes into play in a second role; not only does it help in pointing out the fundamental legal question underlying the Discourse – namely, the continuation of small island States threatened by climate change impacts – it can also become a component of the solution to this legal question.

To be sure, the successful dissemination of the Discourse among relevant global international organizations and the progressive acceptance by a majority of States of the existence of such a threat to the survival of small island States had, first and foremost, the political effect of introducing this matter into the international agenda and of mainstreaming some of the related issues in the mandates of the relevant UN bodies and agencies.¹⁰³³ Therefore, specific effects of the Discourse in the form of policy action can be expected to develop from now on in different areas, including, inter alia, those of human rights and refugee law and policy, or through further development of international scientific survey assistance enabling low-lying island States to conclude maritime delimitation agreements.¹⁰³⁴

However, beyond this concrete short-term effect, the Climate Change and International Security Discourse will arguably be fundamental when the worst-case scenarios

¹⁰³³ See Chapter 3, Section 3.2.2.

¹⁰³⁴ For a more detailed account on the work conducted by the Applied Geo-Science and Technology Division of the Secretariat of the Pacific Community (SOPAC) under the Ocean and Islands Programme which provides vital applied ocean, island and coastal geoscience services to member countries of the Secretariat of the Pacific Community, see Chapter 4, Section 3.1.1.

of de-territorialization or de-population lead to the serious questioning of the future of Pacific islands' statehood. Indeed, as J. Crawford recalls, previous cases of State succession have allowed the international community to acknowledge officially the disappearance of the legal personality of the former State and to recognize a new political entity as the successor of such State; the position of the former State concerning its own continuation or extinction is not irrelevant, however.¹⁰³⁵ Henceforth, the Climate Change and International Security Discourse could arguably serve as an official proof, registered in UN verbatim records and known in advance by the international community, of Pacific Island States' fight against the looming and jeopardizing effects of climate change on their continuation as States. A proof of their resistance to their eventual extinction, illustrating the extent to which the construction and dissemination of a Discourse in the appropriate international fora may not only prevent the concerned States from becoming voiceless under the weight of their situation and their inherently small leverage, but also contribute to their fight against the loss of statehood. Voicelessness and statelessness may thus be bound together. And yet, if the position of the States concerned is not irrelevant to their future as States, how the international community behaves and reacts to the present and future prospects of such a situation is equally important – from a political and from a legal perspective.

3.2. The International Community and Pacific Island States

3.2.1. Past Structural Transformations of the International Community: Their Reflection in the Creation of Pacific Island States

As Rosalyn Higgins pointed out, '*no State is totally without dependence on some other State. A degree of interdependence is in the nature of things*'.¹⁰³⁶ This acknowledgement is widespread

¹⁰³⁵ J. CRAWFORD: '*It must be admitted that, in many of the marginal cases, as well as in the case of States re-established after illegal occupation, notions of continuation contain a distinct element of legal fiction: in such instances, **recognition, and the claims to continuation made by the parties**, may well be determinative*', *supra*, at 401. [Emphasis added]. A prominent example of the fundamental weight of the claims to continuation made by the parties involved in the resolution of the politico-legal situation was when the Russian Federation assumed the former Soviet seat in the Security Council. See also M. P. SCHARF, 'Musical Chairs: the Dissolution of States and Membership in the United Nations', *supra*, who explains at 50, '*Russia would have to argue that it would occupy the Soviet seat not as an entirely new State succeeding to the rights of the Soviet Union (a "Successor State") after the Soviet Union had ceased to exist, but as part of the Soviet Union that had survived the breakaway of the other republics*.' The authors therefore remark in footnote 114 that: '*The importance of Russia's characterisation of itself as the continuation of the USSR cannot be overstated. When, in the case of a substantial change in the State concerned, there are doubts as to the continued existence of the State, the position of the State itself on the issue can be the determining factor*'.

¹⁰³⁶ R. HIGGINS, *supra*, at 41.

among international relations scholars, particularly since the launch of neo-liberal institutionalism, headed by authors such as Robert Keohane and Joseph Nye,¹⁰³⁷ and after which, interdependence and transnational governance came to be settled and defined as a new characteristic of contemporary life.¹⁰³⁸ Yet, Rosalyn Higgins pursued this initial and rather straightforward acknowledgment by highlighting the importance for an entity making a claim to be a State for a '*comprehensive purpose*', such as joining the UN, to have kept an '*essential core of independence*' and not be a mere emanation of another State.¹⁰³⁹ To be sure, from a formal point of view, Pacific Island States could be recognized as autonomous political entities differentiated from one another as well as from their formal colonial or administering States, especially given that their acquisition of statehood was in most cases preceded by the celebration of a referendum which secured the appropriate exercise of Pacific islanders' right to self-determination. And yet, as pointed out on several occasions above, their constitution as truly autonomous, self-sustaining political entities was never pretended to be achieved. Such a high level of dependence on other countries – which led some of them, such as the Marshall Islands, Palau and the Federated States of Micronesia, to choose a compact of free association instead of independence as their preferred form of government – almost prevented their acceptance as full Member States of the UN.

However, as the core characteristic of international society had changed at the time, giving an unprecedented weight and importance to new normative developments, adjustments to the criteria for UN membership ensued. The entry of Pacific Island States into the UN as full Member States therefore mirrored the structural changes that the international community was undergoing and seemingly reflected the underlying forces that were changing the normative grounds of the international system, towards one in which the self-determination of peoples would seemingly crystallize human liberation from colonial oppression, while a new sense of universality – one encompassing all new members recently set free – would arise.

3.2.2. Present Looming Transformations of the International Community: A Reflection on the Treatment of the Pacific Island States' Challenges to the Continuation of Pacific Islands' Statehood?

¹⁰³⁷ In addition to neoliberal institutionalism, wordlist approaches consider that interdependence is indeed, 'in the nature of things'.

¹⁰³⁸ See A. HURRELL, 'The State', in A. DOBSON and R. ECKERSLEY (eds.), *Political Theory and the Ecological Challenge*, 2006, (Cambridge, UK, New York: Cambridge University Press), pp. 165-181, at 168.

¹⁰³⁹ *Ibid.*

If the access of Pacific Island States to UN membership as a consequence of the attribution of statehood was a reflection of the structural changes that the international community was undergoing at the time, it can be argued that the international community's treatment of the issue of the extinction of these same States may follow the same pattern. When dealing with the future of statehood in general terms, Marti Koskenniemi held that '*the formality of statehood remains the last guarantee we have against the conquest of modernism's liberal aspect by modernism's authoritarian impulse.*'¹⁰⁴⁰ He then went on to consider the *substratum* of statehood as being evolutive, flowing and historically contingent, and thus explained that '*the status of statehood can be associated with various sets of rights and duties. It carries no given, determinate, normative implications. [W]e cannot deduce the extent of a State's freedom of action from the mere fact of its Statehood. [T]he construction of rights and duties – giving substance to statehood – remains a matters of **political adjustment** and of finding a **contextual equilibrium in particular circumstances**.*'¹⁰⁴¹ As much as the contextual framework of international life was fundamental for the Pacific Island States to *acquire* statehood and be admitted as full Member States of the UN, the same contextual variable may arguably become just as fundamental for these States to *maintain* their sovereignty and statehood, irrespective of the actual level of deterioration of their geographical, human and political dimensions.

If, as James Crawford explained, a State may not be extinguished by '*substantial changes in territory, population, or government, or even, in some cases, by a combination of all three*',¹⁰⁴² the mechanism through which the continuation of statehood is maintained mirrors that which operated in their coming into being as a State, namely, international recognition. Among the measures that the international community may be called upon to adopt to assist Pacific Island States – most of which will presumably take place through the UN – the non-withdrawal of international recognition, be it through suspension of UN membership, owing to a total incapacity to fulfil the obligations of UN membership, or bilaterally, by unilateral declarations of States, will be the principal means by which Pacific island statehood will be preserved. As already pointed out in Section 2 of the present chapter, in the initial and mid-term phases of de-territorialization and de-population, the preservation of the distinct legal personality of Pacific Island States may be justified on the grounds of practical necessity. As the

¹⁰⁴⁰ M. KOSKENNIEMI, 'The Future of Statehood', *supra*, at 397.

¹⁰⁴¹ *Ibid.*, at 409. [Emphasis added].

¹⁰⁴² J. CRAWFORD, *supra*, at 417.

situation worsens, Pacific islands' governments (whether in situ or ex situ) will require that the States they represent each maintain its legal personality, so as to be able to organize a scheme for the protection of their population (through the issue of passports, negotiation of migration arrangements with other countries or purchase of land abroad where to move the totality of the population), manage the State's assets (legal mechanisms seeking to fix the outer boundaries of their maritime spaces, so that the population may still benefit from the direct or indirect revenues from the exploitation of their State's maritime resources); and, ultimately, take the appropriate political decisions about the State's future as a political entity, leading to either the assumption of their own extinction (which, according to the Climate Change and International Security Discourse, does not seem to be their position so far) or through alternative mechanisms, such as the constitution of a federation or even merger with other bordering States.

As sustaining international recognition of Pacific Island States that have become highly deteriorated by the adverse impacts of climate change can be justified on utilitarian and pragmatic grounds, the temporality of such an argument seems still to be inevitable. Besides, as already pointed out above, the natural bias of the international legal system towards stability will naturally help in maintaining Pacific islands' recognition of statehood and full UN membership for a while. Yet, one may still raise the question of whether it will still make sense to maintain a legal fiction, in situations where the level of deterioration of the material elements of the State may be close to completion, especially if the necessary adjustments to the future of the State and the protection of its population ever come to be made. If the time ever comes when such a point is reached, we shall be facing an unprecedentedly extreme-case scenario and embodying the realm of 'the exception' that, as Carl Schmitt explained, may provide more information on the nature of sovereignty and statehood and perhaps even delimit the presently vague boundaries of these two legal concepts than any other previous situation.¹⁰⁴³ To be sure, questioning whether, even in such extreme circumstances, the continuation of statehood ought to be acknowledged, and considering that such situations would be tantamount to the disappearance of the material elements of the State that the possibility of conceiving a 'metaphysical State' is indirectly being suggested, implies an incursion into a utopia, understood, as defined by M. Koskeniemi, as a realm which directs us to the place 'where developments in the international legal order would like to be seen'. If, as

¹⁰⁴³ C. SCHMITT, *supra* (introduction), at 6-7.

the same author states, '*statehood alone is an insufficient basis for international law*',¹⁰⁴⁴ the next question that arises is whether the justification of the continuation of Pacific islands' statehood (including in extreme circumstances) may be based on other arguments than the merely utilitarian and practical one. An incursion into the realms of both responsibility and possible future prescriptive avenues regarding this matter becomes thereafter necessary.

4. A PLEA FOR THE CONTINUATION OF PACIFIC ISLANDS' STATEHOOD: EXPLORING LEGAL AND ETHICAL GROUNDS

4.1. Legally Based Avenues: State Responsibility and Liability for Climate Change Damage

4.1.1. Duty to Prevent, and Compensation for, Transboundary Damage: A Principal Remedy for Climate Change Damage

When dealing with cases in which State continuation is considered to be at stake, the assumption of the State as a 'legal person' may be as relevant as the analysis of how the basic criteria of statehood have been affected by the changing circumstances. Considering the State from this perspective essentially entails, as J. CRAWFORD indicates, that the State be defined '*as the sum of its rights and duties and, most notably, of its powers and immunities*'.¹⁰⁴⁵ This does not imply, however, that the State's identity is exclusively defined by reference to the legal obligations and rights of the State in question, rather than by application of the criteria of statehood. Endorsing this view, which was formulated by K. Marek and rejected by J. Crawford on different grounds, would indeed be contradictory to the position taken in the present thesis, that statehood is determined by the conjunction of its three basic criteria (territory, population and government), and thus rejects the constitutive theory of recognition.¹⁰⁴⁶ Rather, the observation of the particular rights and duties of States whose continuation is considered to be at stake is based on the understanding that they are the consequence (rather

¹⁰⁴⁴ M. KOSKENNIEMI, *supra*, at 408-409.

¹⁰⁴⁵ J. CRAWFORD, *supra*, at 401-402.

¹⁰⁴⁶ *Contra*, J. CRAWFORD, *supra*, at 401, who explains: '*Allowing greater attitude to recognition and the views of the actors concerned, one would have thought that reasonable solutions to problems of identity could have been found by reference to the basic criteria of statehood affecting the entities at the relevant times. A different approach has been adopted in Marek's leading study: there, the identity is defined by reference to the legal obligations of the State in question, rather than by application of the criteria of statehood*'. While making several objections to Marek's position, Crawford nonetheless acknowledged that: '*This is not to say that the State is some meta-legal thing, qua legal person it is, in a sense, merely the sum of its rights and duties and most notable of its powers and immunities*', at 401-401.

than the criteria) of statehood.¹⁰⁴⁷ In addition, it is crucial to recall that the nature of the factual circumstances threatening a State with extinction may have an impact on the way in which the question of the legal status of the State concerned is resolved. Indeed, as James Crawford recalls, *'effective submersion or disappearance of separate State organs in those of another State, over any considerable period of time, will result in the extinction of the State so long at least as no substantial international illegality is involved'*.¹⁰⁴⁸ This rule, mostly developed for cases of illegal annexation, creates an obligation of non-recognition of the extinction of the annexed State, incumbent upon all States.

An incursion into the field of State responsibility and liability for transboundary harm may thus unveil the existence of particular rights of Pacific Island States that could possibly help in protecting, ensuring or even defending their continuation as States (perhaps even in scenarios in which recognition of the continuation of the States concerned amounts to upholding a legal fiction).¹⁰⁴⁹ To be sure, the difference between cases of illegal annexation and the threats due to climate change impacts on Pacific Island States is that, while the former refers to the breach of the peremptory norm – the general prohibition of the use of force – by classical means (military invasion by a foreign State in the context of *debellatio*), the attack on Pacific islands' territorial integrity results from the adverse effects of acts that do not violate peremptory norms and may not even be prohibited by international law and which are not easily attributable to one State alone. Yet, the possibility of invoking States' responsibility and liability for climate-change damage and to obtain compensation may be useful for Pacific Island States to finance all necessary adaptation and response measures, including, inter alia, the purchase of lands abroad, the development of population plans, the display of survey early-warning mechanisms to avoid catastrophic consequences of climate disasters and to monitor the scope and evolution of the de-territorialization in each State. And indeed, Pacific

¹⁰⁴⁷ J. CRAWFORD, *supra*, at 402, making a fundamental explanation: *'Yet, particular rights, duties and powers in terms of the creation of States, are not criteria for, but rather the consequence of statehood. It therefore seems sensible to make continuity, identity and extinction depend on variants of these basic criteria; that is, primarily, territory, population and independent government, and subsidiary criteria (but criteria which may be particularly important in doubtful or marginal cases), permanence and recognition.'*

¹⁰⁴⁸ J. CRAWFORD, *supra*, at 416. [Emphasis added].

¹⁰⁴⁹ See for instance, P. CASHMAN and R. ABBS, 'Liability in Tort for Damage Arising from Human-Induced Climate Change', in R. Lyster (ed.), *In the Wilds of Climate Law*, 2010, (Brisbane: Australian Academic Press); one recent account of the difficulties of applying the law of State responsibility for unlawful acts to the context of 'sinking islands' can be found in J. McADAM, *Climate Change, Forced Displacement and International Law*, *supra*, at 92-96. The author particularly highlights how establishing causation is likely to constitute the greatest obstacle, but considers nonetheless that *'litigation can serve a political function, in addition to asserting legal rights'*, at 95.

Island States themselves have shown unprecedented interest and engagement in the development of international law on State liability and compensation for transboundary harm. First, it is noteworthy that four Pacific Island States – Fiji, Kiribati, Nauru and Papua New Guinea – made a declaration of interpretation upon their ratification of the UNFCCC stating that their understanding that ‘signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change’.¹⁰⁵⁰ Since September 2011, the President of the Republic of Palau, Johnson Toribiong, embarked on a new legal and political initiative calling for an ICJ Advisory Opinion on the obligations and responsibilities of States under international law.¹⁰⁵¹ While the ultimate aim of this initiative seeks to bring greenhouse gas emissions under control, its launch has been undoubtedly triggered by the prior development of the Climate Change and International Security Discourse, in which the connection between climate change impacts and the threat to the continuation of small island States, as particularly emphasized by Palau’s representative at the 2009 session of the UN General Assembly, was finally acknowledged in the 2011 Security Council Presidential Statement. Unsurprisingly, therefore, President Toribiong repeatedly referred to the successful incorporation of the Discourse into the agenda of the Security Council and of the General Assembly, and the related developments in each of these fora.¹⁰⁵²

So far, the possibility of obtaining remedies for climate change damage has mainly been dealt with in the context of State responsibility and liability for injurious acts not prohibited by international law (rather than within the context of State liability for unlawful acts).¹⁰⁵³ Ever since the beginning of the 1980s, the International Law Commission (ILC) has worked on the codification and development of both the law on prevention of transboundary environmental damage (primary rule), and the law on compensation for such damage

¹⁰⁵⁰ All declarations of interpretation to the UNFCCC can be found at: <http://unfccc.int/essential_background/convention/items/5410.php>.

¹⁰⁵¹ See Johnson TORIBIONG, President, Rep. Palau, Statement to the 66th Regular Session of the United Nations General Assembly (22 September 2011), available at the official website of Palau’s Permanent Mission to the United Nations, at: <<http://gadebate.un.org/66/palau>>. For a recent explanation and defence of the position of the Republic of Palau, see Aaron KORMAN and Giselle BARCIA, ‘Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion’, (2012) *Yale Journal of International Law Online*, vol. 37, pp. 35-42.

¹⁰⁵² See Chapter 3, *supra*.

¹⁰⁵³ For a general explanation of the international liability regime, see for instance K. ZEMAKEK, ‘Causes and Forms of International Liability’, in B. CHENG and E. DUNCAN BROWN (eds.): *Contemporary Problems in International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday*, 1988, (London: Stevens and Sons); and M. BEDJAOUI, ‘Responsibility of States: Fault and Strict Liability’, (1987) *Encyclopedia of Public International Law*, vol. 4, pp. 358-362.

(secondary rule).¹⁰⁵⁴ As extensively developed by Roda Vereyen, the foundations of the law in this field can be found in the no-harm rule existing in customary international law.¹⁰⁵⁵ The 1941 Trail Smelter arbitration case had an important influence on the formulation and content of the no-harm rule and set the basis of the duty to prevent environmental damage and of the law on State responsibility for such damage, not only with regard to States in conflict, but also with regard to the territories of other States, common spaces of mankind and the environment as a whole.¹⁰⁵⁶ Although the basic rationale of the Trail Smelter case would only become clearly significant in the 1990s, the UN Survey of International Law had already concluded as early as 1949 that, on the basis of the principle of territorial integrity, *'there has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of other States in a manner contrary to international law'*. With these 'founding' momentums, the no-harm rule found a special place after being enshrined in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which recognized that States have both *'the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'*¹⁰⁵⁷ It was completed by Principle 22, calling upon States to develop international law on State liability for transboundary harm.¹⁰⁵⁸ The next stage that finally reaffirmed the existence and content of the no-harm rule, and in which the significant impact of the Trail Smelter case became evident, was when, in 1996, the ICJ endorsed it in the Nuclear Weapons case, holding that *'the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'*. All in all, as Vereyen explains, the essential content of the no-harm rule is that it obliges States to continually adapt their behaviour in the light of other States' interests, and is thus an

¹⁰⁵⁴ See J. COMBACAU and D. ALLAN, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing Legal Obligations', (1985) Netherlands Yearbook of International Law, vol. 16, pp. 81- 109.

¹⁰⁵⁵ The no harm rule is also referred to as principle of good-neighbourliness or the rule of harmless use of territory. See P.M DUPUY, 'International Liability for Transfrontier Pollution', in M. BOTHE, *Trends in International Environmental Policy and Law*, 1980, (Gland, Switzerland: International Union for the Conservation of Natural Resources), pp. 369-379.

¹⁰⁵⁶ R. VERHEYEN, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, 2005 (The Hague, Leiden: Martinus Nijhoff Publishers).

¹⁰⁵⁷ Declaration of the United Nations Conference on Human Development, adopted on 16 June 1972, in Stockholm (Sweden), principle 21. [Emphasis added].

¹⁰⁵⁸ *Ibid.*, principle 22, which reads: *'States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction'*.

expression of good faith. Yet this rule, in its customary form, has been limited, for it only entails a duty of prevention, which may only be triggered – according to State practice and scholarship – by significant and serious damage.

The existence of the no-harm rule, as enshrined and expressly recognized in the Stockholm Declaration, was the starting point of the work of the International Law Commission on this matter. As J. Juste Ruiz recalls, the remote roots of the work of the ILC on responsibility and liability for transboundary harm can be traced back to the orientation of the work directed by Roberto Ago on the codification of State responsibility. Ever since R. Ago's first report was released, in 1963, the ILC began recognizing the existence of situations in which State responsibility could be engaged for the injurious consequences of their acts, despite not being prohibited by international law. Following the celebration of the 1972 Stockholm Conference on the Human Environment, the General Assembly tasked the ILC with this matter, which was finally put on its agenda in 1978 under the heading 'Responsibility for Injurious Consequences of Acts not Prohibited by International Law'. Robert Quentin-Baxter was appointed as the first Special Rapporteur, who delivered five reports between 1980 and 1984, including the 1982 schematic outline which sought to address both the preventive and the reparative aspects of the theme, as well as the need to establish a fair balance between the freedom of action of States and their responsibility and obligation not to cause harm to other States; or, in M. Bedjaoui words, *'the necessity of reconciling the greatest possible freedom of action for States with the justified fear that undisciplined use of technological and industrial power might spell the ruin of mankind'*.¹⁰⁵⁹ Then, the ILC appointed Julio Barboza as the second Special Rapporteur, who delivered twelve reports between 1985 and 1996. His proposition was to extend the scope of the proposed rules to harm caused in areas beyond national jurisdiction, and aimed at addressing not only the liability of States but also responsibility for harm by private individuals. As of 1992, the ILC decided that the work on this matter would be pursued gradually, so as to finish first the work on the primary rule on prevention of transboundary harm and continue afterwards with the secondary rule on liability and reparation; this distinction would become more accentuated after, in 1997, the ILC considered that there were two distinct – albeit interrelated – questions which would be dealt with separately from then onwards. As a result of this shift, the work of the Commission on the theme of Responsibility and Liability for Injurious Consequences of Acts not Prohibited by International Law have been, until now, exclusively centred on the codification and development of the primary rule of

¹⁰⁵⁹ M. BEDJAOUI, *supra*, at 360.

prevention. In 1997, the ILC appointed Pemmaraju Sreenivasa Rao as the third Special Rapporteur on this matter, who delivered a report a year later containing seventeen articles exclusively dedicated to the issue of prevention of transboundary harm. Finally, in 2000, the ILC adopted the final text of the project, consisting of nineteen articles on 'Prevention of Transboundary Harm Resulting from Dangerous Activities', which was endorsed in 2001 by the UN General Assembly, along with the recommendation of the ILC to elaborate a Convention based on the draft Articles adopted by the ILC. However, the Assembly limited itself to expressing its gratefulness for the great task undertaken by the Commission, inviting it to re-launch its examination of the issues pertaining to State liability and reparation.

4.1.2. The Maintenance of the Recognition of Pacific Islands' Statehood: A Subsidiary Remedy for Climate Change Damage?

The underdevelopment of the law on State responsibility and liability for transboundary harm makes it difficult, so far, to ascertain whether Pacific Island States may receive economic compensation for the generally acute deterioration of the material elements composing them. The first problem is the lack of a conventional source establishing primary and secondary obligations in instances of transboundary harm. On the one hand, the work of the ILC on State responsibility for injurious acts not prohibited by international law has not been used by the UN General Assembly to promote the celebration of a convention on the duty of prevention in these cases, based on the articles presented and endorsed by it in 2001, while the question of State liability and compensation in such instances remains pending. On the other hand, the multilateral environmental agreements containing the no-harm rule in a conventional form are not applicable in cases of de-territorialization and de-population of Pacific Island States, since the material scope of application of such agreements does not match activities which have been recognized as contributing to climate change. Although, presumably, such lack could be compensated by the fact that the ratification of the UNFCCC by virtually all States – 194 States Parties and one regional economic integration organization – does recognize both the existence of a causal link between the emission of greenhouse gases and climate change – also referred to as the man-made cause of climate change-¹⁰⁶⁰ and the special responsibility of industrialized countries in the emission of greenhouse gases, as is

¹⁰⁶⁰ See UNFCCC, *supra*, paragraph 1 of the Preamble, which reads: '[Parties to this Convention] Concerned that **human activities have been substantially increasing the atmospheric concentrations of greenhouse gases**, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind'. [Emphasis added].

embodied in the structural principle of common but differentiated responsibilities. The ratification of the UNFCCC could therefore have served as the conventional origin of the construction of State responsibility for climate change damage, had it not been for the fact that most States made declarative interpretations of their ratification of UNFCCC explicitly preventing such an application.¹⁰⁶¹ Therefore, all in all, the only 'fall back' source of State responsibility and liability for climate change damage would be the existing customary no-harm rule. Yet, its applicability in these cases would also remain highly questionable, for the absence of fault in such cases is replaced by the need to prove the causal link between the damage and a specific action (non-prohibited by international law) attributable to a specific State. Yet, while the main victims of climate change damage can be quite easily identified – as those pertaining to the group of 'most vulnerable countries' – and the place of Pacific Island States in this group is unquestionable, the attribution to one or more specific States of the particular action that has caused such damage remains difficult, for one main reason. Although the evolution of international law since the end of World War II has come to recognize the existence of 'global commons' (a concept which began in the Law of the Sea with the idea that the high seas were a 'common heritage of mankind', and was applied afterwards to the global atmosphere in the Vienna Convention on the Protection of the Ozone Layer), it still falls short of recognizing the existence of 'global responsibilities' for damage caused by all States but affecting, in a particularly acute way, a specific group of States.

For all these reasons – and pending the finalization of the Advisory Opinion by the International Court of Justice on responsibility for climate change impacts put forward by the Republic of Palau – economic compensation of Pacific Island States from this source seems, unfortunately, unlikely to happen. This is regrettable, for the income obtained from such compensation could be valuable for developing plans in reaction to the progressive deterioration of the material elements of the State. Yet, one could suggest that, as an alternative (or eventually complementary) to the lack of an established right to economic compensation for climate change impacts, a duty to recognize the continuation of the States affected by severe climate change impacts may be upheld. This obligation of recognition – contrasting with the obligation of non-recognition of the extinction of a State following illegal annexation by another State – could be argued, at least during the time when the fate of Pacific Islanders is decided.

¹⁰⁶¹ VEREYEN, *supra*.

4.2. Ethically Based Avenues: Exploring and Contextualizing Streams of Environmental Justice

4.2.1. *The Threat to Pacific Islands' Statehood: A Global, Southern and Post-Colonial Issue*

As the shortcomings of a legally based argument in favour of the continuation of Pacific Island States have been reviewed, the closing section of this thesis presents the basis for a short – and yet important – prescriptive note. To be sure, this is tantamount to entering what Marti Koskenniemi defined as '*the realm of the utopia*',¹⁰⁶² in which the international lawyer, standing in the present, is called upon to think where and how international law should evolve. The first and foremost difficulty when embarking on such a path is being confronted with the task of making epistemological choices, in the midst of a complex system in which the traditionally accepted normative values that underline international legal discourse have been dramatically challenged by new historical circumstances as much as by intellectual arguments. This '*time of perplexity*', as Thomas Frank called it, carries with it the heavy burden of constant uncertainty. And, in fact, it may not seem very coherent to close the thesis with a prescriptive note after having presented and developed it from the assumption that knowledge is culturally determined, so that '*our notions of fairness, as also problems of freedom, are culturally determined and cannot be said to reflect anything but global values*'.¹⁰⁶³ Yet, as this pressing topic will remain, in the years to come, a mutable field of enquiry, a reference to the ethical parameters in which it may be subject to further evolution seems necessary. While a full-fledged and comprehensive conceptualization of this issue in ethical or philosophical terms falls outside the scope of this thesis, this sub-section nonetheless attempts to pinpoint the main *structural* characteristics of the ethical parameters of this topic. In fact, this endeavour seems all the more required that the question of whether – and, in the affirmative, when – a Pacific Island State will cease to exist will presumably be resolved in the political realm before legal arguments are called into play and accommodate the political resolution of the issue at stake. A look at the ethical underpinnings of this situation may therefore serve to help us understand the different present and future political directions promoted.

When sketching the philosophical issue in international environmental law, James Nickel and Daniel Magraw noted that '*the philosophy of environmental law overlaps*

¹⁰⁶² M. KOSKENNIEMI, 'The Future of Statehood', *supra*.

¹⁰⁶³ T. FRANK, 'Epistemology at a Time of Perplexity', (2002) *European Journal of International Law*, vol. 13, issue 4, pp. 1025-1030, at 1026.

considerably with philosophical work in environmental ethics'.¹⁰⁶⁴ Similarly, the issue of State extinction due to or resulting from climate-change impacts overlaps and crosscuts more than one philosophical demand. One way to approach the ethical parameters of this topic is therefore to conceive it as a structure comprising three different layers. The first layer covers the global scale of analysis and allows regarding this issue as pertaining to the broader debate on inter-generational fairness; the second layer, in turn, is grounded in the North/South divide, colouring the global scale of analysis with additional considerations from the third-world approaches to international law on global environmental justice; finally, the third layer adds complexity by reminding us of how the Climate Change and International Security Discourse pointed out the limits of the North/South divide in this case-scenario, for the developmental rationale of emerging countries clashed with the existential claims of Pacific Island States.

The image of 'drowning' or 'sinking' States has certainly come to be equated with one of the most paradigmatic images of today's post-modern global environmental crisis; an image which, Jane McAdam highlights, '*has become the canary in the coalmine – the litmus test for the dramatic impacts of climate change on human society*'.¹⁰⁶⁵ Before considering the consequences of the loss of international legal personality from a geopolitical, State-centred perspective, it is worth noting that this issue represents the most stringent manifestation of the need to take the interests of future generations into account when world governments participate in decision-making. The principle of inter-generational justice, which traditionally arose in the context of decision-making involving resources or pollution,¹⁰⁶⁶ is also referred to in the Preamble as well as in Article 3(1) of the UNFCCC.¹⁰⁶⁷ To be sure, one of the main problems of this principle is that it requires world governments to adopt long-term perspectives about future peoples and future needs about which they lack factual knowledge. Although, as Nickel and Magraw state, we can nonetheless '*be confident that they will need a*

¹⁰⁶⁴ J. NICKEL and D. MAGRAW, 'Philosophical Issues in International Environmental Law', in S. BESSON and J. TASIOLAS, *The Philosophy of International Law*, 2010 (Oxford: Oxford University Press), pp. 453-471, at 453.

¹⁰⁶⁵ J. McADAM, *Climate Change, Forced Migration and International Law*, *supra*, at 119. [Emphasis added].

¹⁰⁶⁶ See, for instance, the early landmark work of E. BROWN WEISS, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, (Tokyo: United Nations University).

¹⁰⁶⁷ UNFCCC, *supra*. While the last paragraph of the Preamble reads '[The Parties to this Convention] Determined to protect the climate system for present and future generations', Article 3(1) stipulates: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

liveable earthly home,¹⁰⁶⁸ this inherent looseness – referred to by Robert Crisp as ‘*the non-identity problem*’ – ¹⁰⁶⁹ surely impinges on the capacity of the principle to effectively influence world governments and relevant actors during decision-making processes. Yet, in many respects, the case of Pacific Island States highly reduces the need to make uncertain projections; somehow, it makes ‘real’, and close to the present time, the needs of the future generations of Pacific islanders. Indeed, it is not surprising that most political statements of Pacific Island States’ representatives continuously make direct references to the next two generation of islanders (that is, to the grandsons and granddaughters of present politicians, some of whom may already be born), and the fear that, as early as within these next two generations, their descendents will be forcibly set apart from their traditional lands and loose a fundamental source of their cultural heritage. Therefore, the ‘sinking State’ paradigm is not only an issue which fits within the moral demands laid down by the principle of inter-generational justice, now quite solidly settled in international environmental law; it also embodies such principle in a way that is closest to a present reality than any other mid- term or long-term scenario to which the principle has been applied.

The principle of inter-generational justice goes hand in hand with the view – particularly widespread among Northern countries – that the defining and ultimate purpose of international environmental law is to improve the state of the ‘global environment’. As much as the ‘sinking State’ paradigm can be approached from this ethical ‘global standpoint’, it is necessary, as Adil Najam explains, to ‘*accept that environmental concerns need to be contextualized within the broader politics of sustainable development, which is itself contextualized within the even broader context of North-South politics*’.¹⁰⁷⁰ Considering in addition that, in the formulation of environmental concerns, ‘*the core of the issue is the environmental condition*’,¹⁰⁷¹ one is called upon to treat today’s extreme vulnerability of Pacific Island States and the threat to the continuation of their statehood as part of a broader context that takes into account their Southern and postcolonial identity as inherent components of such environmental condition.¹⁰⁷²

¹⁰⁶⁸ J. NICKEL and D. MAGRAW, *supra*, at 457.

¹⁰⁶⁹ R. CRISP, ‘Ethics and International Environmental Law’, in S. BESSON and J. TASIOULAS (eds.), *supra*, pp. 473-490, at 477.

¹⁰⁷⁰ A. NAJAM, ‘Why Environmental Politics Look Different from the South?’, in P. DAUVERGNE (ed.), *Handbook of Global Environmental Politics*, 2005, (Northampton: Edward Elgar Pub.), pp. 111-126, at 123.

¹⁰⁷¹ *Ibid.* [Emphasis added].

¹⁰⁷² This is a means to effect what the objective highlighted by Mark Stallworthy, namely to find ‘*available environmental justice frameworks for addressing localized impacts*’ despite the fact that the ‘*law/policy solutions must ultimately be found globally*’, see M. STALLWORTHY, ‘Environmental Justice

For this reason, it is a matter which naturally lends itself to inspection in terms of Third World approaches to international law (TWAIL), a movement which, as Karin Mickelson explains, engages with the predominant discourse of international law and its failure to take into account the perspectives and concerns of the Third World by incorporating the post-colonial critique earlier espoused by Young.¹⁰⁷³ Indeed, the 'sinking island' paradigm is embodied by underdeveloped States that have acquired independent legal personality following decolonization,¹⁰⁷⁴ and whose extreme vulnerability to the impacts of climate change results not only from their geographical characteristics, but is also bound to the colonial exploitation by their former colonial rulers. Indeed, as Ulrich Beck puts it, *'the exposure to risk is replacing the class as the main inequality of modern society, for risk is defined in a reflexive way by the actors. The exposure to risk is basically a power game'*.¹⁰⁷⁵ Therefore, in this sense, the statehood of Pacific Island States threatened by climate-change impacts cannot be understood as being disconnected from the earlier colonial encounter. Rather, their current situation should be seen as a continuation or even as the latest manifestation of such encounter. This approach implies embracing Antony Anghie's view on colonialism; his unwillingness to relegate it to the past and conceive it, instead, as a phenomenon that still *'reproduces itself through its victims and continuously creates and represses new subjects'*.¹⁰⁷⁶

In addition to the consequences of Pacific Island States' post-colonial identity for the understanding of their present environmental condition – and largely connected to these – one should also bear in mind that, in many respects, the 'sinking State' paradigm must also be understood within the context of sustainable development and the North–South divide, generally pertaining to the debate on how global environmental justice should be materialized in an unequal world.¹⁰⁷⁷ For indeed, the image of Pacific Island States, which has penetrated

Imperatives for an Era of Climate Change', (March 2009) *Journal of Law and Society*, vol. 36, issue 1, pp. 55-74, at 73.

¹⁰⁷³ See K. MICKELSON, 'Critical Approaches', in D. DOBANSKY, J. BRUNÉE and E. HEY, *The Oxford Handbook of International Environmental Law*, 2007 (Oxford, UK: Oxford University Press), pp. 262-290, at 273.

¹⁰⁷⁴ For a reconstruction of the history of their creation as States, see Chapter 4, Section 2.2.

¹⁰⁷⁵ U. BECK, 'Vivir en la Sociedad del Riesgo Mundial', (2007) *Documentos CIBOB-Dinámicas Interculturales*, vol. 8, pp. 5-32, at 11: *'La exposición al riesgo está reemplazando a la clase como principal desigualdad de la sociedad moderna, por ser el riesgo definido reflexivamente por los actores. La definición del riesgo es básicamente un juego de poder.'* [My own translation from the Spanish].

¹⁰⁷⁶ See A. ANGHIE, 'The "Heart of my Home": Colonialism, Environmental Damage and the Nauru Case', (1993) *Harvard International Law Journal*, vol. 34, issue 2, pp. 445-473, at 505, (cited in K. MICKELSON, 'Critical Approaches' supra, at 273).

¹⁰⁷⁷ Literature on this issue is of course very extensive and essentially deals with the distributional issues relating to the fair allocation of burdens and benefits of environmental (or, more precisely, climate change) policies. See, for instance, H. SHUE, *Global Environment and International Inequality*, (1999)

today's collective imagination as the paramount example of vulnerability, strikingly contrasts with their almost insignificant responsibility for the creation of climate change. As southern-hemisphere countries, their image also accounts for the unjust and dark faces of an industrial revolution that largely took place within northern-hemisphere industrial countries. As already pointed out in Section 4.1.2, this point is relevant when considering the obligations – be they moral or political – of the international community of not withdrawing the recognition of statehood of Pacific Island States.

And yet, as the reconstruction of the Climate Change and International Security Discourse before universal international organizations revealed, it was the big emerging BRICS countries, leaders of the southern world, who initially stood against the introduction of the Discourse before universal international organizations, so it can be inferred that the 'sinking State' paradigm partly cross-cuts and defies the traditional North–South divide.¹⁰⁷⁸ This, however, is not a circumstance wiping away the fact that the case of Pacific Island States falls within this context. As Adil Najam explains, *'it would be all-too-easy to find examples within specific developing country experiences in global environmental politics that defy the general characterisations above [the North-South tension]. As soon as one shifts one's focus from the Southern collective to individual developing countries [...] one could reasonably argue that a fascination with a broad term such as "sustainable development" is inappropriate.'*¹⁰⁷⁹ However, as the author responds to this reality of international politics, *'equally, it is self-evident that there are many important distinctions within the South'*¹⁰⁸⁰ and highlights the fact that developing countries still project a collective image.

All in all, the ethical parameters in which the 'sinking State' paradigm should not be approached or located within one single ethical stream seems to require a sui generis ethical approximation in which elements of global ethical parameters, such as the principle of inter-generational justice, must be contextualized within the North–South divide and post-colonial critique. Two main considerations can be extracted from this double-edged ethical ground to facilitate understanding of future policy and legal developments. On the one hand, the stream on inter-generational justice invites exploring the situation of Pacific Island States outside the Statist framework, and turning towards the peoples of the region. On the other hand, the relevance of some of the critiques laid down by the TWAIL movement implies that such a turn

International Affairs, vol. 75, issue 3, pp. 531-545; and M. GRUBB, 'Seeking Fair Weather: Ethics and the International Debate on Climate Change', (1995) *International Affairs*, vol. 71, issue 3, pp. 463-496.

¹⁰⁷⁸ See Chapter 3, Sections 2 and 3.

¹⁰⁷⁹ A. NAJAM, *supra*, at 123.

¹⁰⁸⁰ *Ibid.*

towards the peoples should be done by taking into account their southern and post-colonial conditions as elements of their identity. And thus, the sum of these two points leads us to explore, in the last sub-section of this thesis, the relevance of Pacific islanders' right to self-determination in the future resolution of the situation of Pacific Island States, threatened by extinction as a result of climate change impacts.

4.2.2. *The Turn to the Peoples: The Future of Pacific Islands' Statehood in the Light of Pacific Islanders' Right to Self-Determination?*

Irrespective of the legal, political and ethical grounds – all of which may seem, today, quite weak – in favour of the continuation of Pacific Island States' statehood, three scenarios may ultimately crystallize. In the first scenario – the one best preserving the status quo – international recognition of Pacific Island States and independent political entities is simply maintained. For the interim period in which de-territorialization and de-population remain partial, this is the scenario that will presumably take place for all twelve Pacific Island States. However, once total (or at least *en masse*) de-population finally crystallizes, particularly in the three Pacific Island States exclusively consisting of low-lying coral atolls (Tuvalu, Kiribati and the Marshall Islands), States may, as Jane McAdam notes, '*gradually withdraw their recognition of an entity as a State*'¹⁰⁸¹ for, as already pointed out, granting or withdrawing recognition of an entity as a State is a political and discretionary act, which cannot be imposed on any State other than in exceptional cases where the creation of a State results from a previous unlawful use of force or breach of a *ius cogens* rule (in which cases – none of which is the case of Pacific Island States – States are bound not to recognize the new entity as a State).

As already developed in Chapter 4, the Holy See and the Order of Malta exemplify how international law's flexibility may allow for alternative forms of sovereignty to be recognized, even outside the statist framework. In addition, if the international legal personality of Pacific Island States were to become extinct and alternative forms of 'non-State' sovereign statehood were discarded, the future of Pacific peoples' political organization could take various forms, including federation, merger or association with neighbouring countries.¹⁰⁸² Although the decision of whether – and, in the affirmative, which – alternative and exceptional path may be taken to accommodate these unprecedented cases will surely depend, to a great extent, on the reactions of the international community; the will of the actors concerned is equally

¹⁰⁸¹ McADAM, *Climate Change, Forced Migration and International Law*, *supra*, at 158.

¹⁰⁸² See Chapter 4, Section 4.2.

fundamental. This thesis has consistently taken this view, considering that the actors to be taken into account were the Pacific Island States themselves, whose view on their own situation can be, so far, primarily found in the reconstruction of the Climate Change and International Security Discourse. This principled approach is not surprising, for, as James Crawford recalls, the general rule still holds that the State, *qua* community of persons, has rights in international law which are moderated through a government that is '*not necessarily representative, but legally the representative, of the people of the State*'.¹⁰⁸³ Governments represent in international relations not only the State itself, but also, in principle, the people of the State. Nonetheless, the position taken by the government could eventually diverge from the interests or the will of the people of the State that a government represents; also, as is the case of Pacific Island States, when the continuation of the State is put into question, the interests of the people of the State may emerge independently of the official position of the State as expressed through its government. An exploration of Pacific peoples' rights in the context of the possible extinction of their States seems, therefore, both suitable and justified. Two consecutive sorts of rights of Pacific island peoples are likely to become relevant in this context: first, the right to self-determination; and, once self-determination is exercised, the right to physical and cultural existence as peoples (presumably in the territory of another State).

By virtue of this right to self-determination, defined in Article 1 of the International Covenant on Civil and Political Rights, Pacific island peoples have already been called on once to '*determine their political status*' following decolonization.¹⁰⁸⁴ Now, in the midst of ever more pressing forces exerted over the material elements of the State – arguably constituting, as pointed out in the previous Section, the latest manifestation of the colonial encounter – such right may be revived. As Ian Brownlie explains, the exercise of the right to self-determination '*does not necessarily involve a claim to statehood and secession*'.¹⁰⁸⁵ In Pacific island peoples, the idea of the State is not particularly stringent. Indeed, as Jane McAdam highlights '*for many Tuvaluans and I-Kiribati, the issues of key importance to them as the retention of 'home' – land, community and identity – rather than preserving the political entity of the State itself*'.¹⁰⁸⁶ Two

¹⁰⁸³ J. CRAWFORD, 'The Rights of Peoples: "Peoples" or "Governments"?', in J. CRAWFORD (ed.), *The Rights of Peoples*, 1988, (Oxford, UK: Clarendon Press), pp. 55-67, at 56.

¹⁰⁸⁴ International Covenant on Civil and Political Rights, *supra*, Article 1(1), which reads: '*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*'

¹⁰⁸⁵ I. BROWNIE, 'The Rights of Peoples in Modern International Law', in J. CRAWFORD (ed.), *The Rights of Peoples*, *supra*, pp. 1-16, at 6.

¹⁰⁸⁶ McADAM, *Climate Change, Forced Migration and International Law*, *supra*, at 154

main divergent conclusions can be extracted from this fact. On the one hand, one should in principle expect that, if the preservation of the State itself is not of major importance for Pacific island peoples, the exercise of their right to self-determination will thus lean, without much controversy, towards choosing one of '*various models of "self-government" or "autonomy"*' referred to by Brownlie, such as federalism or association with another State (such as Niue and the Cook Islands with New Zealand).¹⁰⁸⁷ On the other hand, however, the fundamental importance of the land in Pacific island peoples' cultural identity leads to the opposite conclusion, for, although the State as a political construct is not an inherent part of Pacific island peoples' identity, the land in which they live – *which corresponds to the territory of the State* – is key. Following Jeremy Waldron's dual conceptual approach to self-determination, it seems that Pacific island peoples' claim to self-determination is closer to the identity-based – rather than the territorially based – approach, for Pacific island peoples seem to regard themselves as culturally – and sometimes also ethnically – distinct.¹⁰⁸⁸ Only in this scenario, the perils of the identity-based conception of self-determination – which '*pulls towards outcomes that might only be achieved by unacceptable methods*' such as secession¹⁰⁸⁹ – are diluted by the same circumstances having raised the exercise of such right.

Possibly forced to continue their existence as peoples as part of one or several other political communities, the maintenance of group identity – which, according to Brownlie, is the second form in which groups' rights are guaranteed after self-determination¹⁰⁹⁰ – will thus be essential for Pacific island peoples to avoid their final disappearance, not only as a State, but also as a people or 'nation'. Ultimately, their challenge will thus be to survive what, in the context of the prohibition of genocide, has come to be referred to as 'ethnocide' – that is, the elimination of a group through cultural annihilation.¹⁰⁹¹

¹⁰⁸⁷ BROWNIE, *supra*, at 6.

¹⁰⁸⁸ J. WALDRON, 'Two Conceptions of Self-Determination', in S. BESSON and J.TASIOULAS (eds.), *supra*, pp. 397-413. In contrast, according to the territorially based conception of self-determination: '*the phrase people of a territory simply refers to all the individual men and women who happen to inhabit the territory in question. It is not assumed that they have any relation to the land much stronger than habitation*', at 407.

¹⁰⁸⁹ *Ibid.*, at 413.

¹⁰⁹⁰ BROWNIE, *supra*, at 6.

¹⁰⁹¹ CRAWFORD, 'The Rights of Peoples: "Peoples" or "Governments"', *supra*, at 59, (explaining that the 1948 Genocide Convention is not concerned with 'ethnocide'). However, on the difficulties of considering cultural rights as people's rights, see for instance, L. V. SCOTT, 'Cultural Rights as Peoples' Rights in International Law', in J. CRAWFORD (ed.), *supra*, pp. 93-106.

5. CONCLUSIONS

As the third material element of the State, besides territory and population, the government embodies the State's distinctive sovereign powers and provides it with the necessary organs to act and to display such powers, both in the national realm and with regard to other States in the international arena. Challenges to the governmental capacity of the State are therefore challenges to the State's capacity to fulfil the range of duties expressing the legitimacy of its existence. The potentially adverse impacts that climate change may have on a State's governmental capacity have therefore been explored from two standpoints. The first was an analysis of how climate change impacts affect the capacity of the State to fulfil the weberian functions of the State vis-à-vis its population, offering them security above all, as well as meeting other basic survival needs. While the controversial concept of failed States is not used in this thesis to define what Pacific Island States may become in the future, it is acknowledged that Pacific islands' capacity to fulfil those functions will probably be undermined as the pressure on the other two pillars of the State continues to increase. Such a progressive decrease in Pacific islands' governmental response capacities may in turn be particularly worsened as the impacts of climate change on the States' territory and population become so acute that the government itself is forced to evacuate the State territory and settle abroad. Recognition of Pacific islands' prospective *ex situ* authorities as governments is then fundamental for the affected States to be able to: conclude the international bilateral or multilateral treaties necessary to secure the protection of the population (for instance, through migration agreements); provide valid authorization allowing international assistance to enter their territory; enact legislation necessary to adapt to the new exceptional circumstances and needs; establish all sorts of disaster-response measures (including, for instance, the adoption of national and/or transnational relocation plans); control State assets in the territory and abroad, as an important source of revenues needed to finance States' responses to acute levels of de-territorialization and de-population.

Although, *prima facie*, the means by which recognition of Pacific islands' *ex situ* authorities as government does not seem to raise any controversy when compared to traditional cases of governments in exile, the special circumstances in which Pacific islands' governments will presumably be forced to evacuate State territory will in the long run generate unprecedented problems. This alludes to the instances in which the severe levels of de-territorialization (leading to possible complete submergence, in the case of the low-lying Pacific Island States of Tuvalu, Kiribati and the Marshall Islands) and de-population (likely to

affect most Pacific Island States as progressive de-territorialization leads to the inhabitability of the State territory) take place at a time when Pacific islands' governments are *ex situ*. In such a possible – yet plausible – scenario, the general assumption of the temporality of *ex situ* governments may no longer apply to Pacific Island States. This would generate a myriad of specific legal consequences regarding, for instance, the suspension or termination of existing treaties for reasons of impossibility of compliance or of a fundamental change in circumstances. However, the paramount consequence is that, through the conjunction of the threat to the three dimensions of the State, the continuation or extinction of Pacific island statehood will be seriously at stake. In such instances, what may initially appear as an uncontroversial application of government recognition would turn into recognition of the continuation of Pacific Island States. Thus, both the response of the international community and the claims of the concerned States regarding their own situations become all the more determinant in defining the future of these States in such extreme and marginal situations.

The present Chapter has shown how, in contrast to the limitations that the adverse impacts of climate change may generate in Pacific islands' governmental capacity with regard to their national sphere, their participation in the international arena, always characterized as highly active and engaged, is likely to be pursued. Indeed, as the history of Pacific Island States shows, their creation as States was closely connected with the underlying normative evolutions that the international legal order underwent as a result of de-colonization and the correlative quest to secure the United Nations as an organization with a genuinely universal scope. For this reason, the admission of Pacific Island States to United Nations membership was virtually tantamount to their recognition as States. Ever since then, their engagement with the international community has remained extremely active, for it is precisely by such a bond to the international community that the inherent governmental limitations are counterbalanced. The development of a regional co-operation network through the establishment of the Pacific Islands Forum, their active participation in multilateral environmental agreements – in particular the UNFCCC, through the AOSIS – are only a few examples of how Pacific Island States remain far from being the mere puppets of the Great Powers. Now that it is their continuation or extinction as States which is at stake, it can be presumed that their active participation in international affairs would, if anything, be all the more increased. As already pointed out, the final elements that will prove to be determinant in the resolution of their status in the future are recognition by other States and their own claims to statehood. It is thus, at this point, that the Climate Change and International Security Discourse acquires a new relevance. It was not only the source of the legitimization of the

question on whether and how do climate change impacts jeopardize the continuation of Pacific islands' statehood; as the Climate Change and International Security Discourse is already a presentation of Pacific islands' plea in favour of their survival as States, it may also constitute an important part of the response on the future of their legal status. And thus, the question of the continuation of Pacific Island States threatened by climate change impacts finds its roots in the political realm, crosscuts different fields of international law, and then is ultimately resolved in the political realm as well; as the central and defining institution of international law is stretched to its extremes, so are the outer boundaries and limits of international law themselves unveiled.

Nonetheless, this closing Chapter has sought to discover whether recognition of the continuation of Pacific islands' statehood could be based on other arguments than that of temporal practical utility or necessity (as a measure to protect their population from statelessness) and the fact that Pacific Island States themselves are seemingly reacting against their possible extinction as States. The first natural incursion is thus focused on the state of the law on State responsibility and liability for climate change damage. There, the present underdevelopment of such legal avenues seems to indicate that the possibility of Pacific Island States obtaining economic compensation for climate change impacts, as recently put forward by Palau's attempt to gather a majority before the UN General Assembly to request from the International Court of Justice an Advisory Opinion on the matter, remains questionable. Yet, it has been suggested that, as an alternative remedy for climate change damage in the case of Pacific Island States, international recognition of their continuation as States – pending the final determination by Pacific islanders of their will – could be raised. Last but not least, as the present state of positive law on the matter remains limited, some ethically based arguments in favour of an evolution in this sense have been raised. By conceptualizing the future of Pacific islands' statehood as a matter of both global environmental justice *to be contextualized* within the post-colonial North–South context, the path of future evolution in international law in this context is traced from a normative perspective. And thus, after coming to terms with the blurred and slippery borders between international law and international politics in the realm of State extinction, one is ultimately – and perhaps also paradoxically – called upon to pierce the veil of the State and consider that the voices which should decide on the future of Pacific Island States, particularly of the three most acutely at risk, may be, also, Pacific island peoples.

CONCLUSIONS

'The law of statehood encapsulates a process not readily classified within the assessment of a conglomeration of facts through manifold legal prisms, which can either be focused and narrow or broad and all-encompassing, such variations are dependent upon whether statehood is viewed – usually a priori – as acceptable or impermissible in any given situation'.

Duncan French, *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, 2013.

1. The Climate Change and International Security Discourse: The Political Representation of Pacific Islands' Struggle for Survival as States

Two years before the turn into the 21st century – at a time when the Climate Change and International Security Discourse had not yet seen the light of day as a distinguishable self-standing political representation of the Pacific islands' struggle for survival – a groundbreaking book, originally entitled *L'objet du siècle*, came to fill the shelves of French bookstores. Written by art historian and Lacanian psychoanalyst, André Wajcman, this work constituted, at its core, a retrospective search to identify the most fundamental heritage that the bloodiest century was leaving to humanity. Starting from the field of fine arts and artistic representation to conduct his quest, Wajcman asked himself which artistic object better captured and defined the true essence of the 20th century. Ruins? No, something stronger, somewhere further. 'Absence', he concludes, is the truthful object of the 20th century, the one that truly signifies such epoch.

Wajcman's endeavour to find in *artistic representation* the essence of that period of human history can to any great extent be reproduced in the realm of politics and law when approaching the object of study of this thesis. For indeed, the starting point of this study has been the discovery – through reconstruction – of a narrative present in the international political sphere where three concepts converge, two of which are the defining concepts structuring international relations virtually since the end of the Middle Ages – the State and its security – and the third – namely, climate change – which owes its recent identification to the scientific investigation of the effects of the greenhouse gas emissions of the late 20th century. If Wajcman's search for artistic representation of the 20th century brought him to the concept of 'absence' in contemporary abstract art, the Climate Change and International Security Discourse which was the subject of the first Part of this thesis and in which all three concepts converge, constitutes the *political representation* of the looming threat of disappearance – as

opposed to absence – of the State which, in the 21st century, is confronted with the adverse impacts of climate change. To be sure, fundamental differences distance Wajcman's endeavour in the artistic field with our quest in the politico-legal arena, the most fundamental of which being that the contextual and psychological framework of Wajcman's search and writing was closely bound to the grave crimes of the Second World War and the Final Solution. Being so much historically tainted, his look was also retrospective. The Climate Change and International Security Discourse is in contrast a narrative mainly providing a political representation of a *prospective scenario*. One that may ultimately – according to the Discourse itself – put at risk the State, this five-hundred-year-old form of political organization, in an unprecedented way. One is asked to reconsider the industrialization of developed States, under this prism, as the beginning of the end of the political independence of small island post-colonial States. In this sense, the Climate Change and International Security Discourse is a testimony of a new shared way of apprehending climate change as a phenomenon; one that reveals a new inherent complex concern, namely, the threat of extinction of small-island statehood as a result of climate change impacts. Forged in the political realm and embodied in the language, the Climate Change and International Security Discourse has thus constructed both new meanings and relationships.

Before the Climate Change and International Security Discourse became recognizable and acquired self-standing, the earlier notion of 'international environmental security' emerged as a combination of two manifestations of the Soviet 'New Thinking' promoted by Mikhail Gorbachev in the mid-1980s – namely, a newly discovered Soviet national environmentalism and the reification of international law. Once coined, 'international environmental security' served as one of the conceptual vehicles of the fundamental change in strategy undertaken by the Soviet Union in the United Nations in the late 1980s. The notion was thus presented to UN bodies in the form of an ambivalent blueprint, as much as an engine of international environmental co-operation as of international disarmament co-operation. Unsurprisingly, the United States of America fiercely opposed the Soviet policy-based and conceptual innovation put before UN organs, albeit that such rejection was more a reaction against the wider Soviet attempt to launch a new debate on the system of international peace and security than against the notion of international environmental security as such. Then, the disintegration of the Soviet bloc produced a double-edged effect on the concept. On the one hand, the Soviet account of 'international environmental security' put before UN organs dissolved; only the positive dimension – which called for the development of international environmental co-operation – was followed up. On the other hand, the notion of

environmental security proved to be a useful compensation for the lack of an 'enemy' syndrome and was re-embraced by American governmental agencies. Important conceptual innovations in the notion of security and its relation to the environment mushroomed in the schools of international security studies, along with determinant reorientation of funding which gave rise to the first empirical attempts to link environmental degradation or stress and violent conflict.

Nowadays, the latter theoretical and empirical accounts of the relation between the environmental and the security spheres developed outside the United Nations system remain (to some extent) active; they have come to coincide with the emergence of the Climate Change and International Security Discourse. While this narrative can be chronologically considered as a 'second wave' of the move linking the environmental and security spheres, and has undoubtedly benefitted from the previous knowledge and experience that policy-makers and research communities had acquired about the links between these two spheres, the Climate Change and International Security Discourse was launched by a set of actors different from those engaged in the 'international environmental security' precedent, responding to different issues and interests taking place within a post-Cold-War setting, and counting with its own specific range of empirical research.

Born in Germany, where the core contentions, innovative language (for instance, referring to climate change as a threat multiplier) and region-based methodology, were settled, the Climate Change and International Security Discourse began to acquire self-standing when the European Union institutionalized it. It is from such a political cradle that the formation of an epistemic community on Climate Change and International Security was settled through the multiplication of EU contract reports, elaborated by the same community that had previously been tasked by the German Government with the early formulations of the links between climate change and security. Simultaneously, as individual EU Member States (UK, Denmark and The Netherlands) mainstreamed the Climate Change and International Security Discourse in the realm of their national security strategies, more research institutions (such as the International Institute for Sustainable Development and the Royal United Services Institute) joined the pioneers (Ecologic Institute and, most importantly, Adelphi Consult). These reports, along with the underlying political will that promoted their elaboration, tailored the Climate Change and International Security Discourse as a widely embracing umbrella under which the manifestation of a range of adverse impacts of climate change (from food security to water stress, sea-level rise or the advance of desertification) were mapped in different regions of the world. However, the differential characteristic of the Climate Change and International

Security Discourse, distinguishing it from other related discourses on climate-change adaptation and resilience, was its grounding purpose: anticipating how those changes might exacerbate local or regional conflict, and correlatively, measuring whether and to what extent these changes were likely to modify the geo-political standing of the regional organizations and the Member States promoting the Discourse.

Once settled, the Climate Change and International Security Discourse was consolidated through its dissemination by the EU to the OSCE and NATO. Within these two regional security organizations, the Discourse became the object of a formal transatlantic dialogue between the EU and OSCE Member States and the United States of America. Then, it was circulated from these 'hegemonic regions' to areas extremely vulnerable to the adverse impacts of climate change. As a result, the originally strong geo-political footprint that the Climate Change and International Security Discourse originally had decreased, and the Discourse thus acquired more legitimacy. The contrast between the incorporation of the Discourse into the agenda of the Pacific Islands Forum, as well as into the work of the African Union, on the one hand, and its restrained acceptance by Asian and Latin American regional organizations (ASEAN, Shanghai Co-operation Organization, Organization of American States, the Caribbean Community, MERCOSUR, UNASUR and ALBA) indicates that a set of conditions was required for a successful dissemination to take place. First of all, the political will of the promoter of the Discourse (the EU) to circulate it to a specific organization needed to become crystallized through the creation or revival of a political partnership, coupled with the association of such an inter-regional co-operation framework with a financial flow (for instance in the form of financial investment in adaptation or in renewable-energy projects). Secondly, the forum for the reception of the Discourse also involves some requisites. It seems important that the members of the regional organization at stake should have a rather homogeneous level of vulnerability to climate-change impacts and share a similar or even common position in climate change negotiations. Also, the existence of interests in common with the promoters of the Discourse or at least the absence of competing economic interest in key areas embraced by the Climate Change and International Security Discourse (such as food or energy security) is fundamental.

Mapping the construction and dissemination of the Climate Change and International Security Discourse at the regional level of analysis facilitated understanding of its widely embracing and complex underlying rationale. Yet, it is when the international community as a whole is confronted with the Discourse that its operation at a universal level of analysis can be truly grasped. The introduction of the Discourse into the work of the relevant universal

organizations had a double-barrelled and reciprocal impact. On the one hand, the purpose-based incorporation of the Climate Change and International Security Discourse into the work of universal organizations reveals the process by which an agenda-setting strategy turns into concrete political action, either by transforming previous patterns of international co-operation or by generating innovative trends. On the other hand, when the Climate Change and International Security Discourse was presented to a genuinely unlimited multilateral setting, namely, the United Nations, it underwent a transformation as a result of political exchange, negotiation and compromise. The 'shared understanding of the world', finally embodied by the Discourse after going through the prism of universal organizations, evolved from its original regional conception and, thus, the concrete actions into which the Discourse may be transformed do not match the original purpose of its proponents either.

The operation of the Climate Change and International Security Discourse within universal organizations can be divided into three main stages. First, the Discourse was introduced to the Security Council as a result of an initiative of the United Kingdom, one of the main 'drivers' of the Discourse within the European Union. This first contact of the Discourse with the UN organ primarily responsible for the maintenance of international peace and security, took place at a time when the institutionalization of the EU was still at a very early stage. Its presentation to the Security Council, where it was seen by UN Member States that had not yet necessarily been reached by the inter-regional circulation of the Discourse, was closely attached to a geo-political view on how the consequences of the phenomenon could affect several key factors of international security – with special emphasis on its effects on the energy sector. The introduction of the Discourse at a time when the 2007 Bali Summit was in preparation, coupled with its original hegemonic-biased shape, conveyed the idea that it essentially served to exert influence and pressure on the mainstream climate change negotiations in an alternative (and arguably illegitimate) way. Despite the fact that States threatened by the most extreme impacts of climate change supported the hegemonic initiative for its capacity to raise awareness and increase the sense of urgency of dealing with climate change, this first attempt to 'securitize' climate change unsurprisingly encountered fierce opposition from States seeking to preserve the originally grounded developmental rationale of international climate change co-operation. However, the shift in the actors determining the introduction of the Discourse into the agendas of relevant UN organs and from the EU to Pacific Island States, which took it from the Security Council to the General Assembly, changed this austere landscape. Indeed, besides the negotiation leading to the endorsement, in 2009, of General Assembly Resolution 63/281 on Climate Change and its Possible Security

Implications, the existential plea of Pacific Island States tainted the core understanding of the Discourse and truly re-signified it. Also, the definition of the respective roles of the UN governing bodies and agencies with respect to the Discourse was also established. Thereafter, the security implications of climate change were particularly associated with the territorial loss and population migration produced by sea-level rise in small island States. This newly fixed understanding of the meaning of the Discourse, as well as the division of competence in this matter among the relevant bodies and organizations, was finally consolidated when climate change entered the agenda of the Security Council for the second time, in 2011. To be sure, the last stage of the operation of the Climate Change and International Security Discourse within the concerned universal organization only implied that climate change would, from now on, be considered by the Secretary-General in his description of the contextual information of Security Council operations but not give rise to concrete measures directed to UN Member States.

Therefore, although so far the Discourse has not turned into actions that might significantly modify the behaviour of either the UN or individual Member States regarding climate change, a fundamental consequence arises in the realm of law. Indeed, the reconstruction of the Climate Change and International Security Discourse has shown how its evolution within universal international organizations led to the recognition that the continuation of small islands' statehood is jeopardized by the looming adverse impacts of climate change. Political consensus exists which considers that this situation embodies, and stands out as, the core issue unveiled by the Climate Change and International Security Discourse. It is an issue which, by its very subject-matter – the central concept of statehood – undeniably deserves and even requires consideration from an international law perspective. Indeed, as Emily Crawford and Rosemary Rayfuse noted, *'while considerations of the effects of climate change may seem premature, the law's quest for certainty requires at least the identification, if not a full consideration, of the possible legal consequences of disappearing States'*.¹⁰⁹² The reconstruction of the Climate Change and International Security Discourse proves that undertaking such a task is not as premature as it may seem when compared with the indications of timing based on strict scientific criteria.

To be sure, the Climate Change and International Security Discourse is not, strictly speaking, an environmentalist discourse – that is, a narrative that defines and interprets environmental affairs and whose ultimate purpose is to address such affairs. Rather, the focus

¹⁰⁹² E. CRAWFORD and R. RAYFUSE,, 'Climate Change and Statehood', *supra*, at 253

of the Climate Change and International Security Discourse is on the effects of an environmental issue with multiple manifestations on the central socio-political organization of the international community. However, the fact that it is the State – and not climate change – which constitutes the central element of the Climate Change and International Security Discourse, does not mean that acknowledgement of the existence of climate change and concern for such environmental problems is negated nor diminished. In other words, the fact that climate change is socially interpreted through the construction by State actors of the Climate Change and International Security Discourse does not imply that the phenomenon as such is unreal from an empirical and scientific perspective, nor that the existence of both perspectives (the Discourse/State and the empirical/scientific perspective) are incompatible or mutually exclusive. Embracing the opposite view – predominant among postmodern authors – which holds that there is no escape from subjective viewpoints, would be tantamount to considering the environment as merely a sub-category of culture. In this thesis, the Climate Change and International Security Discourse has not been considered as ‘positive’ or ‘negative’ per se. Such a normative evaluation has been avoided because it is considered as irrelevant. No judgement of the Discourse itself has thus, purposely, been drawn. Rather, the interest in the reconstruction of the Discourse has focused on what the Discourse may generate in terms of political action in the international sphere which may ultimately lead to the development or launch of law-making processes. As a result, embarking on an analysis and comprehensive consideration of the impacts of climate change on the continuation of Pacific islands’ statehood may not only be based on ‘law’s quest of certainty’, as Emily Crawford and Rosemary Rayfuse held, but truly constitute a response to the socio-political claim driven by the States concerned and formulated through the construction of the Climate Change and International Security Discourse before international fora.

And, thus, the reconstruction of the Climate Change and International Security Discourse reached its natural and chronological end, which is the normative point of departure from which of the legal question it had revealed is addressed.

2. Legal Consequences of Climate Change Impacts on Pacific Islands’ Statehood: Multidimensional Effects and Contextually Dependent Outcomes

When dealing with the consequences of climate change for the continuation of Pacific islands’ statehood, the geographical or spatial dimension of the State is the first factor to be scrutinized. A genealogical study of the meaning of territory in international law first indicated

that, just as the nature of the State – a privileged habitat of the territory – goes beyond the realm of law, the place of territory in international law is equally unsettled and its nature doubtful from a legal perspective. A mosaic of legal accounts of the notion of territory can thus be found; they can be explained by approaching them from a historical perspective and then drawing from such context the differing functions that the territory has played in the international legal order. In the context of the modern European State, the territory was understood as a property of the State (property theory), an element or integral part of the State itself (constitutive theory), or the space wherein the competence of the State was displayed (competence theory). However, when it comes to determining the meaning of territory in post-colonial States, such as Pacific Island States, a fourth understanding of the territory emerges. In these cases, the territory was a vehicle for expressing or manifesting the right of Pacific island peoples to self-determination and political independence from former colonial domination. This particular meaning, that territory is a vehicle for expressing a right, explains why Pacific Island States were granted statehood in spite of their very limited land area (as opposed to very big maritime spaces), and shows how the existence of a solid normative ground may balance and even supersede the viability requirement. In addition, the smallness of Pacific islands' terrestrial extent is largely compensated by vast maritime spaces made available to them under the UN Convention on the Law of the Sea and which are both their major spatial expression and their principal source of economic revenues. Paradoxically, for these so-called 'Ocean States', the sea is as much a fundamental element of their identity and the primary source of their livelihood as it is the source of the threat to their continuation as States.

Henceforth, de-territorialization due to the adverse impacts of climate change on Pacific Island States constitutes, first and foremost, a challenge to these States' maritime entitlements. As their shorelines progressively retreat as a result of sea-level rise and ocean acidification, baselines – generally considered as 'ambulatory' – retreat accordingly, and therefore so does the outer boundary of the State at stake. Devices seeking to halt this effect may include the ratification of maritime delimitation agreements among Pacific Island States and, arguably, the possibility to fix their baselines and to acquire archipelagic status by claiming archipelagic lines and then refraining from updating the official charts. Less useful and more aggressive physical devices, such as the construction of sea walls, have also been considered. And yet, as efforts to freeze, preserve or protect the spatial dimension of Pacific Island States against the adverse impacts of climate change flourish and develop in the region, the prospects of a total de-territorialization scenario cannot be ignored. Alternative responses

to this extreme expression of the impact of climate change include making incursions on re-territorialization strategies, such as the purchase of land or the eventual merger with another State and, most prominently, the possibility to argue that completely submerged Pacific Island States may continue to be recognized as a post-modern or contemporary form of a non-State sovereign entity. The precedents of the Holy See and the Order of Malta, which currently have an atypical status, show that there is room and flexibility in international life allowing a typology of subjects of the international legal system, as long as strong historical and political reasons support this special treatment. It is also a reminder that, although sovereignty is the main and principal characteristic of a State, it can also exist outside a statal framework. Sovereignty and statehood may thus come together, or be set apart, if necessary, to acknowledge the existence of a special political entity that plays a positive role in the international community.

The continuation of Pacific island sovereignty and/or statehood, even in extreme cases of total territorial loss, may be justified by the role played by the second dimension of the State, namely, the population, since a sovereign political entity with international legal personality may result first from its total or acute de-population, before total submergence ensues. Closely connected with the looming prospect of de-territorialization, the primary manifestation of climate change impacts on the human dimension of Pacific Island States is the degradation in the habitability conditions of Pacific islanders. The paradigm reaction to the acute environmental stress suffered by the populations of Pacific Island States is their displacement and consequent relocation to a different place where their basic survival needs may be met. Although such reaction seems, *prima facie*, the most common ultimate form of adaptation, with several previous examples in world history, a closer look at cases of accomplished relocation in the Pacific region have unveiled both their fundamentally different character, as well as the underlying complexities accompanying such a process in this specific region. First, actions conducted in the region seeking to preserve the habitability conditions of Pacific islanders, so as to *prevent* their resettlement, are rather similar and homogeneous across Pacific Island States, given that these governmental actions are organized, co-ordinated and even financed at a regional level and are closely linked to implementation measures stemming from the international regime on climate change, and to international action on disaster risk-reduction. In contrast, when such preventive relocation actions cannot guarantee the maintenance of the basic survival needs of the population, so that Pacific islanders are forced to move, actions seeking to *react* to relocation scenarios differ widely from one island State to another and offer a scattered and highly heterogeneous landscape. These differences

flourish as a result of socio-cultural, political, and geographical factors encompassing, inter alia, the divergent levels of effective presence of the national governments in their populations' daily life, the complexity of land tenure systems, or the differences between relocations that remain within an agricultural setting and relocations implying the move to an urban (and often already overpopulated) setting.

As these root differences are unveiled, a critical approach to how climate-induced displacement has so far been dealt with in international legal scholarship has been laid down. Although, in general, existing studies rightly diagnose the legal challenges at stake – namely, legal scarcity and inappropriateness of the existing instruments and institutions – the solutions proposed to overcome such challenges by, for example, the creation of new legal instruments, development of existing instruments and institutions or inter-regime linkages, are either ill-fitted or insufficient to address the inherent complexities of climate-induced displacement in the Pacific previously revealed. These are somehow top-down responses that do not respond to the existing factual heterogeneity. Besides, and most importantly, none of the proposals made so far takes into account the wider and variable context in which relocations take place, and thus neglects or disregards the issue of the continuation of the State and how such an unresolved matter may greatly affect the responses to the problem of climate-induced displacements. As a result, this thesis has suggested an approach to the issue of the legal protection of Pacific islanders within a multilayered framework that encompasses both the prevention and reactive relocation stages, distinguishes between relocation taking place at a national level from cross-border relocations and, in doing so, replaces the issue within its wider context by associating it with the unresolved question of whether the continuation of the State in question may or may not be at stake. This question is in fact the real axis structuring the proposal to deal with climate-induced displacement through a multilayered legal-protection scheme, and essentially highlights the view that the fate of Pacific islanders and the eventual legal protection they may have cannot be detached from the fate of their State of origin. Then, when called upon to fill each of the stages laid down in the multilayered legal protection scheme with concrete rights, some of the proposals most recurrently upheld in international legal scholarship also appear to be useless in the Pacific. In cases of national displacements – which do not jeopardize the continuation of the State – the applicability of human rights treaty law is very limited, due to the low level of ratification in this region of the International Covenant on Economic, Social and Cultural Rights. Yet, the development of a human rights *approach* may positively inform the implementation of international environmental law instruments – in particular of the UNFCCC, which has been ratified by all Pacific Island States.

National relocation in its reactive phase fundamentally alludes to the level of guarantee or protection of housing, land and property rights which – apart from being quite poorly recognized in international human rights treaty law – are mostly ruled by traditional customary systems that may generate significant obstacles for people displaced as a result of climate change to gain access to new lands. On the one hand, in these cases, the housing, land and property rights of some minority groups (ethnic minorities, women and children) – may be covered by specialized human rights treaties which count with a higher level of ratification than the general instruments (ICESCR and the ICCPR). On the other hand, informal instruments, such as the Guiding Principles on Internally Displaced Peoples, despite serving as an appropriate road map for future normative developments, are yet not well suited to respond to displacements due to environmental conditions rather than conflictual situations. In cases of transnational relocations – which constitute the real looming threat to the continuation of Pacific islands' statehood – difficulties arise out of the multiplicity of States involved (at least including the State of origin and the 'host' State). Given that the moment in which the population of a State and its territory becomes formally discontinued is not settled, this thesis has differentiated between two main situations. In cases of partial de-population, the applicability of refugee law to climate-induced people displacement has not so far been accepted by the national courts of the two potential host countries of the region – Australia and New Zealand; international migration treaty law, whose material scope of application is less specialized than that of the refugee regime, is yet not applicable in the region, owing to the lack of ratification. Finally, the prospect of having to deal with total de-population scenarios in Pacific Island States (before total de-territorialization actually takes place) has shown that, ultimately, the content of this multilayered legal protection scheme in these cases cannot be fixed or defined as long as the contextual issue – namely, whether and when the State becomes extinct – is resolved. The determination of the fate of the State challenged by a high rate of, or total, de-population is a *prerequisite* for the determination of the eventual rights that people displaced by climate change may have. Yet, the answer to this question is beyond the realm of law and forces us to come back to the blurred and slippery boundaries between international law and international life.

Although this fundamental and structuring question – whether and when Pacific island statehood may become extinct – remains outstanding, one thing can be made clear. In all stages and scenarios covered by the multilayered legal protection scheme, the action and presence of the political dimension of the State is fundamental, for it is the government that organizes and finances preventive and, in some cases, reactive relocation actions, and which is

also the entity tasked with negotiating migration agreements with other countries, providing their citizens with travel documents, purchasing land in other countries and, ultimately, raising their voice and defending their cause before the international community. Hence, as the protection of the human dimension of the State is necessarily ensured by its political dimension, it becomes necessary to study the effects of climate change on the governmental capacity of Pacific Island States and the correlative power this dimension may have for the defence of the continuation of their statehood.

The government both embodies State's distinctive sovereign powers and provides the State with the organs necessary to act and to display such powers, both nationally and internationally. First, climate change impacts are likely to affect the capacity of the State to protect its population in terms of security and other basic survival needs. This capacity will probably be even more undermined as the impacts of climate change on the State's territory and population become so acute that the governmental authorities themselves are forced to evacuate the State territory and settle abroad. Recognition of Pacific islands' prospective ex situ authorities as governments is then fundamental for the affected States to be able to conclude the international bilateral or multilateral treaties necessary to secure the protection of the population (for instance, through migration agreements). Although, *prima facie*, the recognition of Pacific islands' ex situ authorities does not seem to raise any controversy when compared to traditional cases of governments in exile, the special circumstances in which Pacific islands' governments will presumably be forced to evacuate State territory will, in the long run, generate unprecedented issues. This alludes to the instances in which the severe levels of de-territorialization and de-population take place at precisely the time when Pacific island governments are forced to evacuate. It is in this still prospective – yet plausible – scenario that one of the outer boundaries of international law is reached, as both the response of the international community and the claims of the concerned States regarding their own situations become all the more determinant in defining the future continuation or demise of these States.

In contrast to the limitations that the adverse impacts of climate change may impose on Pacific island governmental capacity relative to their national sphere, the participation of Pacific Island States in the international arena, which is always characterized as highly active and engaged, is likely to be pursued and all the more increased as their continuation as States becomes increasingly probable. At this point, the Climate Change and International Security Discourse acquires a new relevance. Beginning in this thesis as the source from which raising the question of whether and how climate change impacts jeopardize the continuation of

Pacific islands' statehood was legitimized, it reappears at the end of the thesis as a possible important element of response to the question of Pacific islands' continuation as States. Considering the inherent flexibility and practical nature of international law, it can be argued that the solution to the question will ultimately depend on the practical needs arising out of these extreme-case scenarios once they become present realities. When such a moment arrives, it may well be the first time in which the international community will be confronted with, at least, the following three possibilities: (1) to recognize the continuation of Pacific island statehood, in spite of the acute deterioration of its material elements, at least for the time necessary to ensure the best protection of Pacific islanders against statelessness; (2) to resist the far-fetched legal fiction that an 'immaterial' or almost 'metaphysical' State may continue to exist legally, but to recognize their extinction as States; or (3) to recognize the continuation of their international legal personality in a *sui generis* form.

At this point, Duncan's French contention that the law of statehood, *qua* process, inherently resists 'manifold legal prisms' and is thus subject – and open – to variations, seems to be just as valid and accurate for State creation as it is for State extinction. In fact, despite the widespread tendency to view State creation and State extinction as 'natural opposites', one could argue that they are connected in a circular way. For the eventual extinction of the legal personality of a Pacific island State will necessarily ensue in a new form of political organization for Pacific island peoples. Other than pragmatic factors and feasibility arguments, the normative blueprint determining whether variations in the law of statehood in the case of Pacific Island States can be viewed as acceptable should not only remind us of the ethical compromise vis-à-vis future generations, but also not disregard the fact that today's present vulnerable condition of Pacific Island States is bound to the history of their colonial occupation by certain industrialized countries. May these factors come up in the real political scenario, when a more pressing time crystallizes, and influence the contingencies of the moment, so as to at least give the chance for Pacific Islanders to exercise collectively their right to self-determination. While the exercise of such right at the birth of the State may be of little help to 'save it' – the State's political independence – it may at least contribute to the conservation of Pacific islanders' cultural heritage and group identity.

CONCLUSIONES

*‘El Derecho de la estatalidad encapsula un proceso no fácilmente clasificable en la evaluación de un conglomerado de hechos a través de primas jurídicos variados, que pueden estar enfocados estrecha o ampliamente. Estas variaciones dependen de si la estatalidad es vista – generalmente a priori- como aceptable o no permisible en cada caso’.*¹⁰⁹³

Duncan French, *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, 2013.

1. El Discurso del Cambio Climático y la Seguridad Internacional: Representación Política de la Lucha de las Islas del Pacífico por su Supervivencia como Estados

Apenas dos años antes del comienzo del nuevo milenio – cuando el Discurso del Cambio Climático y la Seguridad Internacional todavía no salido a la luz como la representación política, autónoma y distinguible, de la lucha de las islas del Pacífico por su supervivencia como Estado – una obra revolucionaria titulada originalmente ‘L’objet du siècle’, llenó las estanterías de las librerías francesas. Escrito por el historiador del arte y psicoanalista André Wajcman, este trabajo constituye, en esencia, una búsqueda retrospectiva dirigida a identificar la herencia más fundamental que el más sangriento de los siglos dejaba a la humanidad. Situándose en el ámbito de la historia del arte para realizar su búsqueda, Wajcman se preguntó entonces qué objeto de arte podía capturar y definir mejor la auténtica esencia del siglo XX. Ruinas? No, algo más lejano, y más fuerte. ‘La Ausencia’, concluye, es el verdadero objeto del siglo XX, el único realmente capaz de encapsular el significado de esta época.

El propósito de Wajcman de encontrar en una representación artística la esencia de ese periodo de la historia de la humanidad pueda ser en cierta medida reproducido en el ámbito de la política y el Derecho cuando nos adentramos en el objeto de estudio de esta tesis. En efecto, el punto de partida de este trabajo ha sido el descubrimiento, a través de un trabajo de reconstrucción, de una narrativa presente en la esfera política internacional donde tres conceptos convergen, dos de los cuales son conceptos definitorios y estructurales de las

¹⁰⁹³ Traducción propia. La cita original indica: *‘The law of statehood encapsulates a process not readily classified within the assessment of a conglomeration of facts through manifold legal prisms, which can either be focused and narrow or broad and all-encompassing, such variations are dependent upon whether statehood is viewed – usually a priori – as acceptable or impermissible in any given situation’.*

relaciones internacionales prácticamente desde el final de la Edad Media – el Estado y su seguridad-, siendo el tercero el cambio climático, que debe su reciente identificación al descubrimiento científico del efecto de las emisiones de gases a efecto invernadero iniciados en la era industrial de finales del siglo XIX.

Si la búsqueda del objeto de *representación artística* del siglo XX llevó a Wajcman al concepto de ‘ausencia’ en arte contemporáneo abstracto, el Discurso del Cambio Climático y la Seguridad Internacional, que constituye el objeto de estudio de la primera parte de esta tesis y en el que los tres conceptos convergen, constituye la *representación política* de la amenaza de desaparición – que no de ausencia- del Estado; institución que, ya adentrados en el siglo XXI, se ve enfrentado a los impactos negativos del cambio climático. Por supuesto, diferencias fundamentales distinguen el trabajo de Wajcman en el ámbito artístico de nuestra búsqueda en el terreno político-jurídico, como es el hecho de que el estudio de Wajcman se sitúa en el marco contextual y psicológico íntimamente vinculado a los graves crímenes de la Segunda Guerra Mundial así como a la ‘Solución Final’. Fue un trabajo marcado por un periodo concreto de la historia, y por tanto de corte *retrospectivo*. Por su parte, el Discurso del Cambio Climático y la Seguridad Internacional es, al contrario, una narrativa que provee una representación política de un escenario *prospectivo*. Un escenario que puede en última instancia – y de acuerdo con el propio Discurso- poner en riesgo el Estado, forma de organización política de más de cinco siglos, de manera sin precedentes. Bajo este prisma, conviene también reconsiderar la industrialización de los países desarrollados como el comienzo del fin de la independencia política de los pequeños estados insulares post-coloniales. En este sentido, el Discurso del Cambio Climático y la Seguridad Internacional es un testimonio de una nueva manera común de aprehender el fenómeno del cambio climático, revelando en esta ocasión una preocupación compleja e inherente al fenómeno, a saber, la amenaza de extinción como Estado de las pequeñas islas como resultado de los impactos del cambio climático.

Forjado en el ámbito político y encarnado en el lenguaje, el Discurso del Cambio Climático y la Seguridad Internacional ha construido tanto nuevos significados como nuevas relaciones conceptuales. Antes de que el Discurso fuera reconocible y adquiriera autonomía, el concepto previamente acuñado de ‘seguridad ecológica internacional’, o seguridad ambiental, emergió como resultado de la combinación de dos manifestaciones de la Perestroika o ‘Nuevo Pensamiento Soviético’ promovido por Mikhail Gorbachev a mediados de los años 80. Estas dos manifestaciones son, por un lado, el surgimiento de un nuevo movimiento ambientalista nacional soviético; y, por otro lado, la reificación del Derecho internacional y la consiguiente reconsideración del papel de la ideología en la gestión de las relaciones internacionales. Tras

ser acuñado, el término ‘seguridad ambiental internacional’ sirvió como vehículo conceptual del fundamental cambio de estrategia llevada a cabo por la Unión Soviética en el seno de Naciones Unidas a finales de los años 80. La noción fue por tanto presentada ante distintos órganos de Naciones Unidas bajo un formato y significados ambivalentes, constituyéndose como motor tanto de la cooperación internacional medioambiental, como también de la cooperación internacional en materia de desarme. No es de extrañar de los Estados Unidos de América se opusieran radicalmente a la política e innovación conceptual soviética propuesta ante los órganos de Naciones Unidas, si bien el rechazo fue más una reacción al intento más ambicioso de la Unión Soviética de abrir un nuevo debate sobre el sistema de mantenimiento de la paz y seguridad internacionales que contra la noción de seguridad internacional ambiental como tal. Más adelante, la desintegración del bloque soviético produjo un doble efecto en el concepto. Por un lado, la propuesta soviética de incorporar la noción de ‘seguridad ambiental internacional’ presentada ante los órganos de Naciones Unidas se disolvió. Únicamente la vertiente positiva – que llamaba al desarrollo de la cooperación internacional- continuó su curso. Por otro lado, la noción de seguridad ambiental resultó operar como una útil compensación a al llamado el ‘síndrome del enemigo’, y fue recuperado por agencias gubernamentales americanas. Importante innovaciones conceptuales de la noción de seguridad y su relación con el medio ambiente emergieron en las escuelas de estudios sobre seguridad internacional, acompañadas de una determinante reorientación de recursos financieros que ayudaron a la publicación los primeros estudios empíricos dirigidos a vincular la degradación o el estrés ambiental con el surgimiento del conflicto armado.

Hoy en día, estos últimos estudios teóricos y empíricos sobre la relación entre las esferas del medioambiente y la seguridad, desarrolladas fuera del sistema de Naciones Unidas, permanecen, en cierta medida, activas; llegando a coincidir con el surgimiento del Discurso del Cambio Climático y la Seguridad Internacional. Si bien este Discurso puede ser cronológicamente considerado como la ‘segunda ola’ del movimiento que busca vincular ambas esferas, habiéndose sin duda beneficiado del conocimiento y experiencias previas adquiridas por los negociadores y comunidades investigadoras, el Discurso del Cambio Climático y la Seguridad Internacional fue gestado por un grupo de actores distintos que aquellos involucrados en el precedente de la ‘seguridad ambiental internacional’; respondiendo a distintos problemas e intereses enmarcados en un contexto post-guerra fría; y contando con su abanico de investigación empírica específico y distinguible.

Surgido en Alemania, donde los fundamentos, el lenguaje innovador (que por ejemplo, calificaba el cambio climático como ‘multiplicador de amenazas’) y una metodología basada en

la unidad regional, fueron establecidas, el Discurso del Cambio Climático y la Seguridad Internacional comenzó a adquirir autonomía al ser institucionalizado por la Unión Europea. Es además en el seno de esta cuna política donde se fue formando la comunidad epistémica sobre Cambio Climático y Seguridad Internacional, a través de la multiplicación de informes sobre este tema contratados por la UE y elaborados por la misma comunidad que previamente había sido contratada por el gobierno alemán y que había producido las primeras formulaciones de los vínculos entre el cambio climático y seguridad. Simultáneamente, en su calidad de miembros individuales de la Unión Europea, el Reino Unido, Dinamarca y los Países Bajos incorporaron el Discurso del Cambio Climático y la Seguridad Internacional en el ámbito de sus respectivas estrategias de seguridad nacional, mientras otras instituciones de investigación (tales como el *International Institute for Sustainable Development* y la *Royal United Services Institute*) se sumaron a las instituciones pioneras (*Ecologic Institute* y, sobre todo, *Adelphi Consult*). Estos informes, junto con la voluntad política subyacente que promovió su elaboración, diseñaron el Discurso del Cambio Climático y la Seguridad Internacional como un paraguas de amplio espectro en el que la manifestación de una serie de impactos negativos del cambio climático fueron cartografiados en distintas regiones del mundo (desde seguridad alimentaria, estrés por escasez de agua, aumento del nivel del mar o avance de la desertificación). No obstante, la característica diferencial del Discurso del Cambio Climático y la Seguridad Internacional - que permite distinguirlo de otros discursos relacionados sobre adaptación y resistencia al cambio climático - es su objetivo fundacional: anticipar cómo estas transformaciones pueden exacerbar los conflictos locales o regionales y, correlativamente, establecer en qué medida estos cambios son susceptibles de modificar la posición geo-política de las organizaciones regionales y Estados miembros promotores del Discurso.

Una vez establecido, el Discurso del Cambio Climático y la Seguridad Internacional se consolidó a través de su diseminación por la Unión Europea a la Organización de Seguridad y Cooperación Europea (OSCE) y la Organización del Tratado Atlántico (OTAN). En estas dos organizaciones regionales de seguridad, el Discurso se convirtió en objeto de un dialogo transatlántico formal entre la UE y Estados miembros de la OSCE con los Estados Unidos de América. Después, el Discurso circuló de estas 'regiones hegemónicas' hacia áreas de extrema vulnerabilidad a los impactos del cambio climático. Como resultado de esta circulación, el fuerte sesgo geo-político inherente al Discurso en sus orígenes quedó amainado, permitiendo que el Discurso adquiriese mayor legitimidad. El contraste entre la incorporación del Discurso en la agenda del Foro de las Islas del Pacífico, así como en el trabajo de la Unión Africana, por un lado, y su limitada aceptación por organizaciones regionales asiáticas y latinoamericanas

(ASEAN, Organización de Cooperación de Shanghái, Organización de Estados Americanos, CARICOM, MERCOSUR, UNASUR y el grupo ALBA), indica que el éxito de la diseminación del Discurso depende de la presencia de una serie de condiciones. En primer lugar, la voluntad política del promotor del Discurso (la UE) de circularlo hacia otra organización regional específica requiere, para su cristalización, de la reactivación de un partenariado, alianza o marco de cooperación política, uniendo dicho marco de cooperación inter-regional con una transferencia financiera (por ejemplo, como inversión en proyectos de adaptación o de desarrollo de energías renovables). En segundo lugar, el foro de recepción del Discurso también está sujeto a determinados requisitos. Parece importante que los miembros de la organización regional en cuestión tengan un nivel de vulnerabilidad a los impactos del cambio climático bastante homogéneo, y que compartan posiciones o visiones comunes en el seno de las negociaciones del clima. Asimismo, la existencia de intereses en común con los promotores del Discurso - o al menos, la ausencia de intereses económicos encontrados en áreas clave cubiertas por el Discurso del Cambio Climático y la Seguridad Internacional (tales como seguridad alimentaria o energética) es fundamental.

Identificar y cartografiar la construcción y diseminación del Discurso al nivel de análisis regional facilita la comprensión de su razón de ser, que es tan amplia como compleja. Sin embargo, no es sino cuando la comunidad internacional en su globalidad se ve enfrentada al Discurso que la operatividad de éste a nivel de análisis universal o global puede ser verdaderamente aprehendido. La introducción del Discurso en la agenda de las organizaciones universales relevantes tuvo así un efecto doble y recíproco. Por un lado, la incorporación del Discurso en la agenda de las organizaciones internacionales universales revela el proceso por el que una estrategia de definición de la agenda de trabajo acaba convirtiéndose en acción política concreta, ya sea por transformación de antiguos esquemas de cooperación internacional o mediante la generación de innovadoras tendencias. Por otro lado, cuando el Discurso del Cambio Climático y la Seguridad Internacional fue presentado en un foro genuina e ilimitadamente multilateral – a saber, los órganos de Naciones Unidas-, el Discurso fue transformado como resultado del intercambio político, la negociación y los compromisos resultantes de esta.

La operatividad del Discurso del Cambio Climático y la Seguridad Internacional en el seno de las organizaciones internacionales universales puede ser dividida en tres etapas principales. En primer lugar, el Discurso fue introducido en el Consejo de Seguridad como resultado de una iniciativa del Reino Unido, uno de los principales promotores del Discurso dentro de la Unión Europea. Este primer contacto del Discurso con el órgano de la ONU

responsable del mantenimiento de la paz y seguridad internacionales, tuvo lugar cuando la institucionalización del Discurso en la UE se encontraba todavía en una etapa inicial. Su presentación al Consejo de Seguridad, donde fue recibido por Estados Miembro de la ONU no necesariamente integrados en la circulación inter-regional del Discurso, estaba impregnada de la visión geo-política inicial sobre cómo las consecuencias del fenómeno podían afectar a factores clave de la seguridad internacional – con especial énfasis los efectos del cambio climático en el sector energético. La introducción del Discurso durante la preparación en 2007 de la Cumbre de Cambio Climático, sumado a su formato original de sesgo hegemónico, transmitió la imagen de que, en esencia, el Discurso servía para influenciar y ejercer presión en las negociaciones del clima, perfilándose como una alternativa ‘ilegítima’ a éstas. A pesar de que los Estados amenazados por los impactos más extremos del cambio climático apoyaron la iniciativa hegemónica por su capacidad de generar e incrementar la idea de que reaccionar frente al fenómeno es una necesidad urgente, no es de extrañar que el primer intento de abarcar el cambio climático desde la perspectiva de la seguridad encontrara fuerte oposición por parte de Estados preocupados por preservar la razón de ser original de la cooperación internacional en materia de cambio climático. No obstante, una vez que la introducción del Discurso en la agenda de los órganos relevantes de Naciones Unidas pasó de la Unión Europea a ser encabezado los Estados Insulares del Pacífico, y trasladado del Consejo de Seguridad a la Asamblea General, el nivel de recepción y aceptación del Discurso transformó el panorama austero inicial. En efecto, además de la negociación que culminó con la adopción en 2009 de la Resolución de la Asamblea General 63/281 sobre Cambio Climático y sus Posibles Implicaciones para la Seguridad, la súplica existencial de los Estados Insulares del Pacífico tiñó el sentido fundamental del Discurso, produciendo una auténtica re-definición o re-significación de éste. Asimismo, los roles respectivos de los órganos y agencias de Naciones Unidas con relación al Discurso fueron igualmente perfilados. A partir de entonces, las implicaciones en materia de seguridad del cambio climático fueron en concreto asociadas a la pérdida de territorio y movimientos migratorios de la población de los pequeños Estados insulares afectados por el aumento del nivel del mar. El nuevo sentido del Discurso, así como la división de competencias de esta problemática entre los órganos y organizaciones relevantes, quedó finalmente consolidada cuando el cambio climático fue incorporado en la agenda del Consejo de Seguridad por segunda vez, en 2011. Ciertamente es que la última etapa de la operatividad del Discurso del Cambio Climático y la Seguridad Internacional en el Consejo de Seguridad no dio lugar a la adopción de medidas concretas dirigidas a los Estados miembro de Naciones Unidas. No obstante, sí implicó que el cambio climático sea en adelante tomado en cuenta por el

Secretario General de Naciones Unidas en la descripción de la 'información contextual' relativa a las operaciones militares del Consejo de Seguridad.

A pesar de que hasta el momento el Discurso no se ha cristalizado en acciones reales susceptibles de modificar el comportamiento de la ONU ni de los Estados miembros individuales con relación al cambio climático, una consecuencia fundamental surge en el ámbito jurídico. En efecto, la reconstrucción del Discurso del Cambio Climático y la Seguridad Internacional ha demostrado cómo la evolución de éste en el seno de las organizaciones internacionales universales dio lugar al reconocimiento de que la continuación como Estado de las pequeñas islas está seriamente amenazada por los impactos adversos del cambio climático. Hoy por hoy, hay consenso político en cuanto a la consideración del Discurso del Cambio Climático y la Seguridad Internacional encarna y desvela esta cuestión fundamental. Siendo la estatalidad el concepto central de esta problemática, merece consideración y estudio desde la perspectiva del Derecho internacional ya que, tal y como apuntan Emily Crawford y Rosemary Rayfuse, *'a pesar de que las consideraciones sobre los efectos del cambio climático parecen prematuras, la búsqueda del Derecho por la certidumbre requiere, al menos, la identificación – si no la total consideración- de las posibles consecuencias jurídicas de la desaparición de los Estados'*.¹⁰⁹⁴ La reconstrucción del Discurso del Cambio Climático y la Seguridad prueba que realizar esta tarea no es un propósito tan prematuro como puede parecer desde una perspectiva basada en criterios de probabilidad y predicción científica.

Ciertamente, el Discurso del Cambio Climático y la Seguridad Internacional no es, en sentido estricto, un discurso medioambientalista – es decir, una narrativa que define e interpreta las cuestiones medioambientales y cuyo último propósito es abordar tales cuestiones. Más bien, el foco del Discurso del Cambio Climático y la Seguridad está en los *efectos* de un problema medioambiental con múltiples manifestaciones en la organización socio-política de la comunidad internacional. No obstante, el hecho de que sea el Estado – y no el cambio climático- el concepto central del Discurso sobre Cambio Climático y Seguridad Internacional, no significa que la existencia del cambio climático y la preocupación por problemas medioambientales sean negadas o infravaloradas. En otras palabras, el hecho de que el cambio climático sea socialmente interpretado a través de la construcción por parte de actores estatales del Discurso del Cambio Climático y la Seguridad no implica que el fenómeno como tal sea irreal desde una perspectiva empírico-científica, ni tampoco que la existencia de

¹⁰⁹⁴ E. CRAWFORD and R. RAYFUSE,, 'Climate Change and Statehood', *supra*, at 253

ambas perspectivas (el Discurso/Estado y la empírico/científica) sean incompatibles o mutuamente excluyentes.

Adoptar la visión opuesta – predominante entre los autores postmodernos- que considera que no hay escapatoria o salida a la subjetividad de los puntos de vista, sería como considerar que el medioambiente no constituye sino una sub-categoría de la cultura. En esta tesis, el Discurso del Cambio Climático y la Seguridad Internacional no ha sido considerado como ‘positivo’ o ‘negativo’ como tal. Una evaluación normativa en este sentido ha sido voluntariamente evitada por ser considerada irrelevante. Más bien, el interés de la reconstrucción del Discurso se ha centrado en la acción política que puede potencialmente generar en la esfera internacional, pudiendo llevar en última instancia al desarrollo o lanzamiento innovadores procesos de creación normativa. Como resultado, embarcarse en un análisis y en la consideración exhaustiva de los impactos del cambio climático en la continuación de los Estados insulares del Pacífico puede no basarse meramente en la ‘búsqueda del Derecho por la certidumbre’ – *‘the law’s quest of certainty’*-, abogada por Emily Crawford y Rosemary Rayfuse, sino constituir una respuesta real a la reivindicación socio-política dirigida por los Estados afectados y formulada a través de la construcción del Discurso sobre Cambio Climático y Seguridad Internacional en organizaciones internacionales.

Y así, el final natural cronológico de la reconstrucción del Discurso del Cambio Climático y la Seguridad Internacional constituye a su vez el punto de partida normativo de la pregunta jurídica revelada por dicho Discurso.

2. Consecuencias Jurídicas de los Impactos del Cambio Climático en la Estatalidad de las Islas del Pacífico: Efectos Multidimensionales y Resultados Coyunturales

Al abordar las consecuencias del cambio climático en la continuación de los Estados insulares del Pacífico, la dimensión geográfica o espacial del Estado es el primer factor merecedor de escrutinio. Un estudio genealógico del significado del territorio en Derecho internacional indica, en primer lugar, que así como la naturaleza del Estado (hábitat conceptual privilegiado del territorio) es una cuestión que supera el ámbito del Derecho, el espacio del territorio en Derecho internacional es una cuestión igualmente irresoluta y su naturaleza jurídica cuestionable. Es posible dibujar un mosaico de explicaciones jurídicas sobre la noción de territorio, desde una aproximación histórica, y tras la cual se establezca en cada contexto las diferentes funciones operadas por el territorio en el orden jurídico internacional. En el contexto del Estado moderno europeo, el concepto de territorio ha sido aprehendido

como propiedad del Estado (teoría de la propiedad), como elemento o parte integral del Estado en sí (teoría constitutiva), o como el espacio en el que se extiende que la competencia del Estado (teoría de la competencia). No obstante, cuando se trata de determinar el significado del territorio en los Estados post-coloniales, tales como los Estados insulares del Pacífico, emerge un cuarto sentido del concepto de territorio. En estos casos, el territorio debe ser entendido como vehículo para la expresión o manifestación del derecho de los pueblos insulares del Pacífico a la auto-determinación e independencia política de la dominación colonial. Este sentido particular y específico, consistente en considerar el territorio como un vehículo para expresar un derecho, explica por qué los Estados insulares del Pacífico fueron reconocidos como Estado a pesar de su más que limitado espacio terrestre, y muestra cómo la existencia de una base normativa sólida puede equilibrar e incluso suplantar el criterio de la viabilidad. Por ende, la reducida extensión terrestre de los Estados insulares del Pacífico se ve está ampliamente compensada por los vastos espacios marinos que les fueron otorgados por la Convención del Mar, y que constituyen tanto su fuente prominente de expresión espacial como su principal fuente de recursos económicos. Paradójicamente, para estos países, a menudo denominados ‘Estados oceánicos’, el mar constituye tanto un elemento fundamental de su identidad y fuente primaria de su sustento, como el origen de la amenaza latente a su continuación como Estados.

Así, la des-territorialización debida a los impactos del cambio climático en los Estados insulares del Pacífico constituye, en primer lugar, un desafío a los derechos sobre los espacios marinos de estos Estados. A medida que sus costas retroceden progresivamente como resultado del aumento del nivel del mar y de la acidificación de los océanos, las líneas de base – generalmente consideradas como ‘ambulatorias’- retroceden correlativamente, y por tanto igualmente retroceden las fronteras marítimas del Estado afectado. Entre los mecanismos jurídicos destinados a frenar estos efectos, cabe destacar la ratificación de acuerdos de delimitación marítima entre los Estados insulares del Pacífico, así como la posibilidad de fijar las líneas de base, adquirir la condición de Estado archipelágico al establecer el trazado de las líneas, y después abstenerse de poner al día las cartas náuticas oficiales. Otros mecanismos menos útiles y más agresivos - de naturaleza física y no jurídica - como la construcción de rompeolas o diques en el mar, también han sido considerados por algunos de los Estados afectados. No obstante, mientras los esfuerzos por congelar, preservar o proteger la dimensión espacial de los Estados insulares del Pacífico contra los impactos adversos del cambio climático florecen y se desarrollan en la región, el escenario prospectivo de una des-territorialización total no puede ser ignorado. Entre las respuestas alternativas a esta

expresión extrema de los efectos nocivos del cambio climático, se incluyen las estrategias jurídicas de re-territorialización, tales como la compra de terrenos en países extranjeros; la eventual unión con otro Estado; o bien, como ejemplo más prominente y audaz, la posibilidad de considerar a los Estados insulares del Pacífico completamente sumergidos como una forma post-moderna o contemporánea de entidad soberana no estatal. Los precedentes de la Santa Sede y la Orden de Malta, que todavía hoy mantienen un estatus atípico, muestran que hay espacio y flexibilidad en la vida internacional como para aceptar y permitir la existencia política de una tipología variada de sujetos del sistema jurídico internacional - siempre y cuando fuertes razones de índole histórico-política justifiquen o expliquen este trato especial. Dichos precedentes son igualmente un recordatorio de que, a pesar de que la soberanía es la principal característica del Estado, ésta puede operar también fuera del marco estatal. Soberanía y estatalidad pueden por tanto venir de la mano, o existir separadamente, en caso de que la necesidad urja a reconocer la existencia (o sub-sistencia) de una entidad política especial que juega un papel positivo en la comunidad internacional.

La continuación de la soberanía y/o estatalidad de los Estados insulares del Pacífico, incluso en casos extremos de pérdida territorial total, puede estar justificada por el papel operado por la segunda dimensión del Estado, es decir, su población, dado que la desaparición de una entidad soberana estatal con personalidad jurídica internacional sería en principio resultado de la total o grave despoblación del Estado, acaecida antes de que la sumersión total del territorio tenga lugar.

Estrechamente conectado con la acechante perspectiva de des-territorialización, la primera manifestación de los impactos del cambio climático en la dimensión humana de los Estados insulares del Pacífico es la degradación de las condiciones de habitabilidad de sus habitantes. La reacción paradigmática al estrés medioambiental agudo sufrido por las poblaciones de los Estados insulares del Pacífico es su desplazamiento y consiguiente relocalización a un nuevo emplazamiento donde sus necesidades de supervivencia básicas puedan quedar cubiertas. Aunque esta reacción parece, *prima facie*, la forma más común de adaptación, como ha quedado registrado en numerosos ejemplos de la historia universal, una mirada más cercana a los casos de relocalización llevados a cabo en la región del Pacífico sur desenmascara tanto el carácter fundamentalmente diferencial de estos casos, como las complejidades subyacentes del proceso de relocalización es esta región específica.

En primer lugar, las acciones operadas en la región para preservar las condiciones de habitabilidad de los habitantes de los Estados insulares del Pacífico, tales como prevenir su reasentamiento, son similares de Estado a Estado, dibujando por tanto un escenario

homogéneo en esta región. Esto se debe a que las acciones gubernamentales son organizadas, coordinadas e incluso financiadas a nivel regional y están estrechamente vinculadas a las medidas de implementación de proyectos provenientes del régimen internacional contra el cambio climático, así como a la acción internacional en materia de reducción del riesgo de desastres.

En contraste, cuando tales acciones preventivas de relocalización no pueden garantizar el mantenimiento de las necesidades de supervivencia básicas, resultando en el desplazamiento forzado de los habitantes isleños de la región, las acciones concebidas para reaccionar frente a los escenarios de relocalización varían en gran medida de Estado a Estado, ofreciendo por tanto un escenario disperso y altamente heterogéneo. Estas diferencias florecen como resultado de factores socio-culturales, políticos y geográficos que incluyen, *inter alia*, los distintos niveles de presencia efectiva de los gobiernos nacionales en la vida diaria de la población; la complejidad de los sistemas de propiedad y tenencia de la tierra—generalmente basadas en reglas consuetudinarias ancestrales—; o las diferencias entre relocalizaciones que tienen lugar dentro de un escenario agrícola y aquéllas que conllevan el traslado de una parte de la población a un espacio urbano (generalmente ya sobrepoblado).

Tras revelar estas diferencias fundamentales, cabe realizar aproximación crítica a cómo el desplazamiento inducido por el cambio climático ha sido hasta ahora abordado por la doctrina internacionalista. A pesar de que, en general, los estudios existentes diagnostican correctamente los desafíos jurídicos en juego—a saber, la escasez normativa y el carácter inapropiado de los instrumentos e instituciones existentes—las soluciones propuestas para superar dichos desafíos—por ejemplo, con la creación de nuevos instrumentos jurídicos, desarrollo de instrumentos e instituciones existentes, o promoción de los vínculos inter-regímenes—son, o bien inapropiados, o bien insuficientes para abordar las complejidades inherentes al fenómeno del desplazamiento inducido por el cambio climático en la región de Pacífico sur mencionadas previamente. Estos estudios proponen respuestas deductivas o ‘*top-down*’ que no responden a la heterogeneidad fáctica existente. Además, cabe en particular resaltar que ninguna de las propuestas hasta ahora formuladas tiene en cuenta la variable contextual que enmarca dichas relocalizaciones, desatendiendo o ignorando el problema de la continuación del Estado y cómo esta cuestión pendiente condiciona las respuestas propuestas al problema de los desplazamientos. Como resultado de esta visión crítica de la literatura existente, esta tesis ha propuesto una aproximación a la cuestión de la protección jurídica de los habitantes de las islas de Pacífico a través de un marco multi-nivel que integre tanto las etapas de relocalización preventiva y reactiva; distinga entre relocalizaciones a nivel nacional y

relocalizaciones trasfronterizas; y, por consiguiente, reubique el problema en su contexto más amplio al asociarlo con a la cuestión irresoluta, de si la continuación del Estado en cuestión puede o no estar amenazada. Esta cuestión es en realidad el autentico eje estructural de la propuesta de tratar el desplazamiento inducido por el cambio climático a través de un esquema de protección jurídica multi-nivel, y esencialmente recalca la idea de que el destino de los habitantes de las islas del Pacífico y su eventual sistema protección jurídica no puede quedar disociada del destino de su Estado de origen. A continuación, cuando se trata de llenar cada unos de los estratos que componen el marco jurídico multi-nivel de referencia con derechos concretos, algunas de las propuestas más recurrentes en la doctrina internacionalista resultan igualmente inútiles en la región del Pacífico sur. En casos de desplazamientos nacionales – que no ponen en peligro la continuación del Estado – la aplicabilidad de los tratados de derechos humanos es muy limitada, debido al bajo nivel de ratificación en la región del Pacto internacional de Derecho Económicos, Sociales y Culturales. No obstante, el desarrollo de una aproximación desde la perspectiva de los derechos humanos podría tener un impacto positivo en la implementación de instrumentos de derecho internacional del medio ambiente – en particular del Convenio Marco de Naciones Unidas sobre Cambio Climático, que ha sido ratificado por todos los Estados del Pacífico. La relocalización nacional en su fase reactiva alude fundamentalmente a los niveles de garantía o protección de derechos de alojamiento, tenencia de la tierra y de propiedad que, además de estar poco reconocidos en tratados de derechos humanos, se encuentran sobre todo regulados por sistemas tradicionales consuetudinarios que pueden generar obstáculos significativos a que los desplazados por el cambio climático puedan acceder a nuevas tierras. Por un lado, en estos casos, los derechos de alojamiento, tenencia de la tierra y de propiedad de algunos grupos minoritarios (minorías étnicas, mujeres y niños)- pueden quedar cubiertos por tratados de derechos humanos especializados que cuentan con un mayor nivel de ratificación que los instrumentos generales. Por otro lado, instrumentos informales, como los Principios Rectores sobre Desplazados Internos, a pesar de poder servir de guía a futuros desarrollos normativos, no son adecuados para responder a los desplazamientos inducidos por factores medioambientales. En casos de desplazamientos transnacionales – que constituyen la auténtica amenaza a la continuación como de las islas del Pacífico como Estados – surgen dificultades relacionadas con la multiplicidad de Estados involucrados – ya que incluyen al menos al Estado de origen y al Estado de acogida. Dado que el momento en el que la relación entre la población de un Estado y su territorio se vuelve formalmente discontinua no está fijado, esta tesis ha distinguido dos tipos de situaciones. En casos de despoblación parcial, la aplicabilidad del derecho de los

refugiados a los desplazados inducidos por el cambio climático no ha sido hasta el momento aceptada por los tribunales nacionales de los dos países con potencial de acogida de la región – Australia y Nueva Zelandia. Por otro lado, el derecho internacional migratorio de fuente convencional, cuyo ámbito de aplicación material es menos especializado que el del régimen de los refugiados, no es sin embargo, todavía aplicable en la región, debido al bajo nivel de ratificación. Finalmente, la perspectiva de tener que lidiar con escenarios de despoblación total en los Estados insulares del Pacífico (antes de que la des-territorialización total llegue a cristalizarse), ha demostrado que a fin de cuentas el contenido del marco jurídico multi-nivel para estos casos no puede fijarse ni definirse hasta que la cuestión contextual - es decir, si el Estado se extingue y, en su caso, en momento en que la extinción puede ser reconocida objetivamente- quede resuelta.

La determinación del destino del Estado desafiado por un alto nivel o total despoblación es un prerrequisito para la determinación de los derechos de los que las personas desplazadas por el cambio climático podrán, eventualmente, prevalecerse. No obstante, la respuesta a esta pregunta supera las fronteras formales del Derecho y nos fuerza a regresar a los límites difusos y resbaladizos entre el Derecho internacional y las relaciones internacionales.

Aunque esta pregunta estructural y fundamental – si la personalidad jurídica internacional de los Estados insulares del Pacífico puede llegar extinguirse – permanece sin resolver, un punto puede al menos quedar establecido con claridad: en todas las etapas y escenarios cubiertos por el marco de protección jurídica multi-nivel, la acción y la presencia de la dimensión política del Estado es fundamental, ya que es el gobierno quien organiza y financia las acciones preventiva de relocalización (en algunos casos, también las acciones reactivas), siendo asimismo la entidad encargada de negociar los acuerdos migratorios con otros países; de entregar a sus ciudadanos documentos de identidad y pasaportes para viajar; de comprar tierras en otros países; y, en última instancia, de levantar la voz y defender la causa del Estado que representan ante la comunidad internacional. Por tanto, dado que la protección de la dimensión humana del Estados está necesariamente vinculada e incluso asegurada por dimensión política, es necesario estudiar los efectos del cambio climático en la capacidad gubernativa de los Estados insulares del Pacífico y el poder correlativo que esta dimensión tiene en la defensa de la continuación de su estatalidad.

El gobierno encarna los poderes soberanos distintivos del Estado y otorga al Estado los órganos necesarios para actuar y ejercitar estos poderes, tanto a nivel nacional como internacional. En primer lugar, los impactos del cambio climático probablemente afecten a la capacidad del Estado de proteger su población en términos de seguridad y demás necesidades

básicas de supervivencia. Esta capacidad quedará probablemente socavada a medida que los impactos del cambio climático en el territorio del Estado y de su población se vuelvan tan acuciantes que las propias autoridades se vean forzadas a evacuar el territorio del Estado e instalarse en el extranjero. El reconocimiento de las futuras 'autoridades *ex situ*' de los Estados insulares del Pacífico como gobiernos adquiere entonces una relevancia fundamental para los Estados afectados, en particular de cara a poder concluir tratados y acuerdos bilaterales o multilaterales necesarios para asegurar la protección de la población (por ejemplo, a través de acuerdos migratorios). A pesar de que, *prima facie*, el reconocimiento de las autoridades *ex situ* de las islas del Pacífico no genera ningún tipo de controversia cuando se compara su situación con los casos tradicionales de gobiernos en el exilio, las circunstancias especiales en las que los gobiernos de las islas del Pacífico se verán forzados a evacuar el territorio generarán, a largo plazo, una serie de problemáticas sin precedentes. Esto alude en particular a las instancias en que el Estado es testigo y víctima de niveles severos de des-territorialización y despoblación al tiempo que los gobiernos de las islas del Pacífico se ven forzados a evacuar el territorio nacional. Este escenario prospectivo – y sin embargo plausible- nos acerca a unas de las fronteras del Derecho internacional, ya que tanto la respuesta de la comunidad internacional como las reivindicaciones de los Estados afectados se constituyen como factores determinantes en la definición de la futura continuación o desaparición de estos Estados.

En contraste con las limitaciones que los impactos adversos del cambio climático puede imponer en la capacidad gubernativa de las islas del Pacífico con relación a su esfera nacional, la participación de los Estados insulares del Pacífico en la esfera internacional – que se caracteriza siempre por su alto nivel de actividad y compromiso- probablemente proseguirá su curso, e incluso se acrecentará a medida que su continuación como Estados se torne cada vez más improbable. Llegado este momento, el Discurso del Cambio Climático y la Seguridad Internacional adquiere una nueva relevancia. Si bien al comienzo de esta tesis se configuraba como la fuente de legitimación de la pregunta jurídica – en qué medida los impactos del cambio climático amenazan la continuación como Estado de las pequeñas islas del Pacífico - el Discurso reaparece al final de esta tesis como un probable importante elemento de respuesta a dicha pregunta. Considerando la inherente flexibilidad y naturaleza práctica del Derecho internacional, es posible argumentar que la solución a la cuestión dependerá, en última instancia, de las necesidades prácticas que surjan de estos escenarios extremos, una vez se configuren como realidades presentes. Llegado este momento, es posible que por primera vez la comunidad internacional se vea frente, al menos, tres posibilidades: 1) reconocer la continuación como Estado de las islas del Pacífico, a pesar del agudo deterioro de sus

elementos materiales, al menos por el tiempo necesario para asegurar el mayor nivel de protección de los habitantes de las islas del Pacífico frente a la apatridia; 2) resistir la ficción jurídica de que un Estado 'inmaterial' o incluso 'metafísico' puede continuar a existir jurídicamente, y reconocer su extinción como Estado; o bien 3) reconocer que la continuación de su personalidad jurídica internacional bajo una forma *sui generis* hasta ahora desconocida.

Frente a este abanico de posibilidades, la consideración de Duncan French de que el Derecho relativo a la condición de Estado (*'the law of statehood'*) está sujeto – y abierto- a variaciones, parece ser tan válido y pertinente para la creación de los Estados como para la extinción de estos. De hecho, a pesar de la tendencia ampliamente extendida que considera la creación del Estado y su extinción como 'opuestos naturales', es posible concebir ambos procesos como conectados de manera circular - siendo en realidad, parte de un único proceso-, dado que la eventual extinción de la personalidad jurídica de un Estado insular del Pacífico dará lugar, necesariamente, a una nueva forma de organización política de sus habitantes. Dejando de lado los factores prácticos y argumentos de viabilidad, el plan de acción normativo que determinará si las variaciones en el Derecho de la estatalidad, necesarias en el caso de los Estados insulares del Pacífico, son o no aceptables, debiera tomar en cuenta no sólo el compromiso ético suscrito por la comunidad internacional de cara frente a las futuras generaciones; sino también reconocer que la condición de vulnerabilidad actual de los Estados insulares del Pacífico está íntimamente vinculada a la historia de su ocupación y explotación colonial por ciertos Estados industrializados. Que muchos de esos factores emerjan en los escenarios políticos reales, cuando tiempos de mayor presión sobre estos Estados se cristalice, e influencien las contingencias del momento, para que al menos los habitantes isleños del Pacífico tengan la oportunidad de ejercer colectivamente su derecho a la auto-determinación. Quizás el ejercicio de este derecho con el nacimiento de la nueva forma de organización política pueda al menos contribuir a la conservación de la herencia cultural e identidad grupal de los pueblos del Pacífico.

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LIST OF TABLES

Chapter 4

| | |
|--|---------|
| TABLE 1. Unilateral Claims of Maritime Zones and Continental Shelf in the Pacific Region..... | 244-245 |
| TABLE 2. Sea-Level Rise and Undelimited Maritime Boundaries of the Pacific Region | 248-252 |
| TABLE 3. Climate Change Effects and Maritime Delimitation Agreements of the Pacific Region..... | 264-268 |

Chapter 5

| | |
|--|---------|
| TABLE 4. Accomplished Climate-Induced Relocations in Small Pacific Island States..... | 304-307 |
| TABLE 5. Multilayered Legal Protection Scheme for Climate-Induced Displacements in the Pacific..... | 332 |
| TABLE 6. Ratification by Pacific Island States of Human Rights Treaties Relevant in Reactive Relocation Phase..... | 344 |
| TABLE 7. Ratification by Pacific States (including Australia and New Zealand) of International Treaties Relevant in Transnational Depopulation Scenarios..... | 350 |

